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TRANSC RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 239.

J. H. WADE, PLAINTIFF IN ERROR,

VS.

THE TOWN OF WALNUT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 5, 1879.

blot of

SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Tuesday, the tenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and third year.

WILLIAM H. BRADLEY, *Clerk.*

J. H. WADE
v. } Assumpsit.
THE TOWN OF WALNUT.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the fourth day of April, A. D. 1879, came the said plaintiff by Thomas S. McClelland, his attorney, and filed in the office of the clerk of the circuit court of the United States for said northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and declaration against the said defendant in said entitled cause; which said bond and declaration are, respectively, in the words and figures following, to wit:

Bond for costs.

2 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, May term, A. D. 1879.

J. H. WADE
v. } In assumpsit.
THE TOWN OF WALNUT.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him. Dated this 4th day of April, A. D. 1879.

EDWARD HUNT.

(Endorsed:) Filed April 4, A. D. 1879. Wm. H. Bradley, clerk.

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States, May term, A. D. 1879.

J. H. Wade, who is a citizen of the State of Ohio, residing at Cleveland, in said State of Ohio, plaintiff in this suit, by Thomas S. McClelland, his attorney, complains of the Town of Walnut, a body 3 corporate organized, existing, and doing business under and by virtue of the laws of the State of Illinois, and located in the county of Bureau, in said northern district of Illinois, the defendant in a plea of trespass on the case on promises:

For that whereas heretofore, to wit, on the first day of January, A. D. 1871, at the district aforesaid, the said defendant, by the name and style of Walnut Township, made, executed, and delivered its certain five hundred and nineteen (519) instruments partly printed and partly in writing, nineteen (19) of which being numbered respectively numbers 346, 347, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 374, 395, 396, 397, 398, and 399, payable to the bearer thereof on the first day of January, A. D. 1874, at the National Bank of Commerce, in the city of New York.

Also one hundred of which, being numbered from 301 to 400 inclusive, payable to the bearer thereof on the first day of January, A. D. 1875, at the National Bank of Commerce, in said city of New York.

Also one hundred of which, numbered from 301 to 400 inclusive, payable to the bearer thereof on the first day of January, A. D. 1876, at the National Bank of Commerce, in said city of New York.

Also one hundred of which said instruments, numbered from
4 301 to 400 inclusive, payable to the bearer thereof on the first day
of January, A. D. 1877, at said National Bank of Commerce, in
New York City.

Also one hundred of which said instruments numbered from 301 to 400 inclusive, payable to the bearer thereof on the first day of January, A. D. 1878, at said National Bank of Commerce, in New York City.

And also one hundred of which said instruments, numbered from 301 to 400 inclusive, payable to the bearer thereof on the first day of January, A. D. 1879, at said National Bank of Commerce, in New York City.

And plaintiff avers that all of said instruments, commonly called interest warrants, or coupons, were signed by M. Knight as supervisor of said Town of Walnut, and William Landers, the town clerk of said Town of Walnut, defendant as aforesaid, and are fac-similes of each other, except as to their numbers and the dates upon which the same respectively mature and become due and payable, and are for the sum of ten dollars each.

And plaintiff further avers that said interest warrants or coupons were for and did represent the annual interest due and payable by said defendant on said first days of January in each of the years 1874, 1875, 1876, 1877, 1878, and 1879, respectively, upon the bonds of said The Town of Walnut, bearing numbers corresponding to and with the num-
bers of said interest warrants, or coupons, which said bonds
5 were for the sum of one hundred dollars each, and were made,
executed, and delivered by said defendant on to wit, on said
January 1st, 1871, and signed by said M. Knight, supervisor, and said William Landers, town clerk of said defendant, as above set forth, and made payable to the Illinois Grand Trunk Railway, or bearer, on the first day of January, A. D. 1881, at the office of the State treasurer, in Springfield, Illinois, with interest thereon from January 1st, A. D. 1871, at the rate of ten per centum per annum, payable annually at said National Bank of Commerce on presentation and surrender of the coupons annexed to said bonds as they severally became due and payable.

And plaintiff further avers that said bonds were numbered, respectively, from number 301 to 400 inclusive, and that the instalments of interest, or the coupons attached thereto representing the interest, due on said bonds, and maturing before the instruments sued on herein, were paid by said defendant, and that all interest due on said bonds, and each and every of them, except the interest warrants sued on herein, has been duly paid.

And plaintiff avers that said bonds were fac-similes of each other and alike except as to the numbers thereof, and recited on their face that they were issued under and by virtue of the charter of the Illinois Grand Trunk Railway, and amendments thereto, and other laws
6 of the State of Illinois, and in accordance with the vote of the electors of said The Town of Walnut, at the special election held August 6th, A. D. 1870, in accordance with the said charter and amendment and laws.

And plaintiff further avers that said bonds were issued by said defendant under the name and style of The Township of Walnut, in the county of Bureau and State of Illinois aforesaid.

And plaintiff further avers that he became the purchaser and owner of said bonds, and each and every of them, with each and every of said coupons attached thereto, to wit: Said one hundred bonds numbered from 301 to 400 inclusive, together with all the coupons attached thereto, including said 519 coupons sued on herein, on to wit, on the 27th day of September, A. D. 1871, and before said bonds and coupons became due and payable for a good and valuable consideration, to wit, at the rate of ninety-seven cents on the dollar for all of said bonds and coupons maturing on the first day of January, 1872, and in good faith, without any notice of any defence to said bonds and interest-warrants, or any or either of them,

And plaintiff further avers that each and every of said interest-warrants or coupons were alike and fac-similes of each other, except as to their numbers and the dates of their maturing or becoming due and payable, and were of the same tenor and effect, and were, except
7 as to their numbers and dates of maturity, in words and figures as follows, to wit:

"$10.] Walnut Township. [No. 301.

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer, January 1st, 1879, ten dollars, at the National Bank of Commerce, New York.

"WM. LANDERS,
"*Town Clerk.*

"M. Knight, *Supervisor.*"

(On face, in red ink:) 8.

And plaintiff further avers that each and every of said bonds, from which said interest-warrants or coupons were detached by the plaintiff as aforesaid, were and are alike and fac-similes of each other, except as to their numbers, and of the same tenor and effect, and are, except as to their numbers, in words and figures as follows, to wit:

"Number 301.] [Dollars 100.

"United States of America.

"State of (Vignette.) Illinois.

"*Walnut Township Railroad Bond.*

"Know all men by these presents that the Township of Walnut, in the county of Bureau and State of Illinois, is indebted to the Illinois Grand Trunk Railway, or bearer, in the sum of one hundred dollars, lawful money of the United States, which the said Township of Walnut

promises to pay to the said Illinois Grand Trunk Railway, or to the bearer hereof, on the first day of January, in the year one thousand eight
hundred and eighty-one, at the National Bank of Commerce,
8 New York, on the presentation of this bond, with interest thereon
from the first day of January, A. D. 1871, at the rate of ten per centum per annum, payable annually at the office of the State treasurer, in Springfield, Illinois, on the first day of January in each year, on the presentation and surrender of the annexed coupons as they severally become due.

"This bond is issued under and by virtue of the charter of said Illinois Grand Trunk Railway and amendments thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township, at the special election held August 6th, A. D. 1870, in accordance with said charter and amendment and laws.

"In witness whereof the said Township of Walnut has caused these presents to be signed by the supervisor and clerk of said township this first day of January, one thousand eight hundred and seventy-one.

"WM. LANDERS,
"*Town Clerk.*

"M. KNIGHT, *Supervisor.*"

And plaintiff further avers that each and every of said bonds bore the following endorsement in writing, to wit:

"THE ILLINOIS GRAND TRUNK RAILWAY,
"By A. H. CASTLE, *President.*"

And plaintiff further avers that each and every of said bonds had
endorsed upon the back thereof the following certificate of the
9 auditor of public accounts of the State of Illinois, in accordance
with the laws of said State of Illinois, to wit:

"AUDITOR'S OFFICE, ILLINOIS,
"*Springfield, April 15th,* 1871."

"I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day pursuant to the provisions of 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869.

"In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] "C. E. LIPPINCOTT,"
"*Auditor P. A.*"

And the plaintiff avers further that said defendant by means of the premises on, to wit, on the sixth day of January, A. D. 1879, then and there at the district aforesaid, became liable to pay said plaintiff the said sum of money in said five hundred and nineteen (519) interest-notes or coupons specified, and each and every of them according to the tenor and effect thereof, and being so liable, the said defendant, in consideration thereof, then and there promised the plaintiff to pay him
said sum of money in said five hundred and nineteen (519) cou-
10 pons or interest-warrants mentioned and each and every of them
according to the tenor and effect of the same whenever the defendant should thereunto be afterwards requested.

Yet the said defendant not regarding its said promises and undertakings, but contriving, etc., although often requested so to do, has not paid said plaintiff either of said sums of money above mentioned or any part thereof, but so to do has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said plaintiff of ten thousand dollars, and therefore he brings suit, &c.

THOMAS S. McCLELLAND,
Plaintiff's Attorney.

Copy of coupon No. 301, being one of a series, No. 8, and due Jan'y 1, 1879, and being a fac-simile of 100 coupons sued on, numbered from 301 to 400 inclusive, due Jan'y 1, 1879.

"$10.] Walnut Township. [No. 301.

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer January 1st, 1879, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS,
"*Town Clerk.*

"M. KNIGHT,
"*Supervisor.*"

(On face in red ink:) 8.

11 Copy of coupon No. 301, series 7, due Jan'y 1, 1878, and a fac-simile of 100 coupons numbered from 301 to 400, due Jan'y 1, 1878.

"$10.] Walnut Township. [No. 301.]

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer January 1st, 1878, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS, *Town Clerk.*

"M. KNIGHT, *Supervisor.*"

(On face in red ink:) 7.

Copy of coupon No. 301, *due Jan'y* 1, 1877.

"$10.] Walnut Township. [No. 301.

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer January 1st, 1877, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS, *Town Clerk.*

"M. KNIGHT, *Supervisor.*"

(On face in red ink:) 6.

Copy of coupon No. 301, *due Jan'y* 1, 1876.

"$10.] Walnut Township. [No. 301.

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer January 1st, 1876, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS, *Town Clerk.*

"M. KNIGHT, *Supervisor.*"

(On face in red ink:) 5.

Copy of coupon No. 301, *due Jan'y* 1, 1875.

"$10.] Walnut Township. [No. 301

12 "Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer January 1st, 1875, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS, *Town Clerk.*

"M. KNIGHT, *Supervisor.*"

(On face in red ink:) 4.

Copy of coupon No. 346 *of the* 19 *coupons sued on herein and due Jan'y* 1, 1874.

"$10.] Walnut Township. [No. 346.

"Railroad bond interest-warrant.

"Supervisor of Walnut Township pay to bearer Jan'y 1st, 1874, ten dollars at the National Bank of Commerce, New York.

"WM. LANDERS, *Town Clerk.*

"M. KNIGHT, *Supervisor.*"

(On face in red ink:) 3.

COPY OF ACCOUNT SUED ON.

The Town of Walnut, Bureau County, Illinois, to J. H. Wade, Dr.

To 100 coupons due Jan'y 1, 1879	$1,000 00
" interest on same to April 1, 1879	15 00
" 100 coupons due Jan'y 1, 1878	1,000 00
" interest on same to April 1, 1879	75 00
" 100 coupons due Jan'y 1, 1877	1,000 00
" interest on same to April 1, 1879	135 00
" 100 coupons due Jan'y 1, 1876	1,000 00
" interest on same to April 1, 1879	195 00
" 100 coupons due Jan'y 1, 1875	1,000 00
" interest on same to April 1, 1879	255 00
" 19 coupons due Jan'y 1, 1874	190 00
" interest on same to April 1, 1879	2 85
Due April 1, 1879. Total	$5,817 85

13 *The Town of Walnut to J. H. Wade, Dr.*

To amount due on the coupons, or interest-warrants, $10,000 00

(Endorsed:) Filed April 4, 1879. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 5th day of June, A. D. 1879, said defendant, by A. C. Story, its attorney, filed in said clerk's office its demurrer to the declaration in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer to declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court, to the May term, 1879.

J. H. WADE
vs.
THE TOWN OF WALNUT.
} Assumpsit.

And the said defendant, The Town of Walnut, by Allan C. Story, her attorney, comes and says actio non, because she says that the said declaration and the matters and things therein mentioned in manner and form as the same are therein stated and set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against this defendant, and this defendant is not bound 14 in law to answer the same, and this the defendant is ready to verify, wherefore judgment is prayed, &c.

By A. C. STORY,
Def't's Att'y.

(Endorsed:) Filed June 5, 1879. Wm. Bradley, cl'k.

Afterwards, to wit, on the 10th day of June, A. D. 1879, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

J. H. WADE
vs.
THE TOWN OF WALNUT.
} Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration herein, and after hearing the arguments of counsel, the court, being sufficiently advised in the premises, sustains said demurrer, and orders that this cause be dismissed at the costs of the plaintiff.

It is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff its costs and charges 15 in this behalf expended, amounting to the sum of thirteen dollars and seventy-five cents, and that it have execution therefor.

And afterwards, to wit, on the 18th day of June, A. D. 1879, said plaintiff, by his attorney, filed in said clerk's office his bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, J. H. Wade, George A. Sanders, of the city of Springfield, Sangamon County, Illinois, , of Springfield, Sangamon County, Illinois, and Edmond Hunt, of the county of Cook and State of Illinois, in the northern district of Illinois, are held and firmly bound unto the Town of Walnut, Bureau County, Illinois, and in said northern district of Illinois, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents. Witness our hands and seals this 13th day of June, A. D. 1879.

The condition of the above-bounden obligation is such that whereas the said The Town of Walnut did, on the 10th day of June, A. D. 1879, in the United States circuit court for the northern district of Illinois, and at the May term thereof, recover a judgment against the
16 above-bounden J. H. Wade for its costs in that behalf sustained, and for the dismissal of the cause in said court, wherein said J. H. Wade was plaintiff and said The Town of Walnut was defendant, from which said judgment of the said circuit court of the United States for the northern district of Illinois the said J. H. Wade has prayed for and has obtained a writ of error to the Supreme Court of the United States:

Now, therefore, if the said J. H. Wade shall duly prosecute said writ of error with effect, and moreover pay the said costs rendered and to be rendered against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and effect.

J. H. WADE. [SEAL.]
GEORGE A. SANDERS. [SEAL.]
EDMOND HUNT. [SEAL.]

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 18, 1879. Wm. H. Bradley, cl'k.

17 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a correct and complete transcript of the record of the proceedings had in said court in the cause wherein J. H. Wade is the plaintiff and The Town of Walnut is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 18th day of August, 1879, and of our Independence the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

18 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is before you in said circuit court, between J. H. Wade, plaintiff, and The Town of Walnut, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said J. H. Wade, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 103rd year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed) Supreme Court of the United States. J. H. Wade vs. Town of Walnut. Writ of error.

19 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the Town of Walnut greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein said The Town of Walnut is defendant in error and J. H. Wade is plaintiff in error, to show cause, if any there be, why the judgment entered and therein mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, this eleventh day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

20 (Indorsed:) Supreme Court of the United States. J. H. Wade, pl'ff in error, vs. The Town of Walnut, def't in error. Citation to October term, A. D. 1879.

Service accepted this 18th day of June, 1879.

ALLAN C. STORY,
Att'y for Town of Walnut.

(Indorsement on cover:) No. 239. J. H. Wade, plaintiff in error, vs. The Town of Walnut. N. Illinois C. C. U. S. Filed 5th September, 1879.

SUPREME COURT U. S.
FILED
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IN THE

Supreme Court of the United States,

(No. 239.)

OCTOBER TERM, A. D. 1881.

J. H. WADE, *Plaintiff in Error,* *vs.* THE TOWN OF WALNUT, *Defendant in Error.*	**Writ of Error to Circuit Court of the United States, Northern District of Illinois.**

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS S. McCLELLAND,
Counsel for Plaintiff in Error.

GEO. A. SANDERS,
Attorney for J. H. Wade.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1881

IN THE

Supreme Court of the United States,

(No. 239.)

OCTOBER TERM, A. D. 1881.

J. H. WADE, *Plaintiff in Error,* *vs.* THE TOWN OF WALNUT, *Defendant in Error.*	**Writ of Error to Circuit Court of the United States, Northern District of Illinois.**

BRIEF + FOR + PLAINTIFF + IN + ERROR.

FACTS.

This suit is brought upon 519 interest coupons cut from the bonds of defendant in error, bearing numbers from 301 to 400, both inclusive. These bonds were executed January 1, 1871, under and in pursuance of an act of the Legislature of the State of Illinois, entitled "An act to incorporate the Illinois Grand Trunk Railway," and the amendments thereto, and in accordance with the vote of the people of the town of Walnut, on August 6, 1870. The bonds were issued by the defendant in error to the railway company, in consideration of and in payment for an equal amount, in par value, of the stock of the Illinois Grand Trunk Railway, which the town subscribed for, and which was duly delivered to the town, at the time it passed the bonds. This stock the town has continued to hold, and still holds, claiming property interests in the same.

The coupons sued on, except as to 19, matured in 1875, 1876, 1877, 1878, and 1879. The coupons which matured in previous years were duly paid.

The plaintiff in error purchased the bonds and coupons in September, 1871, paying ninety-seven cents on the dollar for them, in good faith, and without any notice that the defendant in error set up or claimed any defense to them.

The bonds themselves matured January 1, 1881.

The entire issue of bonds by this town was $40,000, or 400 bonds of $100 each, and numbered consecutively from 1 to 400. They were all executed and delivered at the same time, and the consideration was a certificate of stock in the railway company for $40,000, which was delivered to the town, and which it still holds.

The bonds numbered from 1 to 300, issued by this same town, were passed upon by this court in *Town of Walnut* v. *Wade*, 103 U. S. 683, and held valid. In this case we have only the bonds numbered from 301 to 400 to consider.

A demurrer was filed to the declaration, and issue was joined thereon. The demurrer was sustained by the court below, and an appeal prayed to this court. The questions in this case, under the pleadings, are:

1. Whether or not this court has not already held the instruments sued on herein valid obligations against the town.

2. Was the election, held August 6, 1870, under which the instruments sued on in this case were issued, illegal or void by reason of any provision of the Constitution of Illinois of 1870.

3. Having issued its bonds bearing every indicia of validity, and having paid three years' interest on the same, is not the town estopped from denying their validity.

4 If the election of August 6, 1870, was in fact unwarranted by the fundamental law of Illinois, still are not the instruments in question subject to action in the hands of the plaintiff, an innocent holder for value, upon the ground that those bonds were issued in payment of stock, and in consideration therefor, which stock was delivered to the town, and it now holds the same.

In other words, can the town hold on to the consideration and refuse to pay the debt.

ERROR.

1. The Circuit Court erred in sustaining the demurrer of defendant in error to the declaration of plaintiff in error.

2. The Circuit Court erred in not overruling said demurrer.

3. The Circuit Court erred in not finding for the plaintiff in the court below, and entering judgment in his favor for the amount due upon the instruments sued upon.

4. The rulings of said Circuit Court were otherwise informal and erroneous.

BRIEF.

I.

This court has already passed upon the validity of the bonds of the defendant in error, and the question is *res judicata.*

Walnut v. *Wade*, 103 U. S. 683.

II.

The Constitution of Illinois of 1870 did not go into effect until August 8, 1870, two days after the election was held at which the bonds in controversy were voted.

Constitution of 1870, Schedule, secs. 1, 11, 12, 25, and Governor's Proclamation, pp. 42 to 64, Gross' Statutes, 1871.

Cooley's Cons. Lim. 67.

People v. *Potter*, 47 N. Y. 377.

People v. *Supervisors*, 3 Barb. 333.

Real v. *The People*, 42 N. Y. 270.

Richter v. *Poppenhauser*, 42 N. Y. 373.

People v. *Norton*, 59 Barb. 169.

People v. *Gardner*, 45 N. Y. 816.

People v. *Gardner*, 59 Barb. 198.

Manly v. *State, etc.*, 7 Maryland, 135.

Slack v. *Maysville R. R. Co.*, 13 Ben Monroe, 17, 18.

State v. *Commissioners*, 37 N. J. L. 288.

Homestead Cases, 22 Gratt. 266.

Charless v. *Lamberson*, 1 Iowa, 443.

Bennett v. *Bevard*, 6 Iowa, 89.

Scott v. *Davenport*, 34 Iowa, 211.

Gas Co. v. *City, etc.*, 13 Iowa, 233.

Cochran v. *Taylor*, 13 Ohio St. 382.

Wartman v. *Philadelphia*, 33 Penn. St. 202.
White v. *Hart*, 13 Wall. 646.
Logan v. *State*, 3 Heisk (Tenn.) 442.
State v. *McAdoo*, 38 Ill. 455.
Chance v. *Marion Co.*, 64 Ill. 70.
Thompson v. *Alexander*, 11 Ill. 142.
McHaney v. *Trustees*, 68 Ill. 142.

To construe the act of a legislative body, we must view the act as a whole, in order to arrive at its true meaning.

Cooley on Cons. Lim. 57, 58.
Decker v. *Hughes*, 68 Ill. 41.
Perteet v. *The People*, 65 Ill. 232.
Way v. *Way*, 64 Ill. 410.

In providing articles to the Constitution of 1870, to be voted upon separately, the authors of that instrument followed a system adopted in New York and Iowa, which calls into operation the rule, that in construing the Constitution of Illinois touching those separate articles, the same construction must be given as was given by the Supreme Courts of Iowa and New York.

McCutcheon v. *The People*, 69 Ill. 609.

The Constitution not fixing, *in hæc verba*, a different day for the going into effect of the "Municipal Aid" article, it must of necessity have followed the body of the Constitution and become operative on August 8th; otherwise we have a connected whole going into operation in parts.

Supervisors, etc., v. *Keady*, 34 Ill. 296.

III.

The town having voted the bonds, its officers having executed them, the State Auditor having certified them, and the town having paid interest for some three years, it should be estopped from denying their validity.

Knox Co. v. *Aspinwall*, 21 How. 539.
Bissell v. *Jeffersonville*, 24 How. 287.
Moran v. *Comm.* 2 Black. 732.
Mercer Co. v. *Hackett*, 1 Wall. 291.
Stephenson v. *Schenck*, 5 Wall. 772.
Pendleton Co. v. *Avery*, 13 Wall. 305.

ARGUMENT.

MAY IT PLEASE THE COURT:

At the October Term, 1880, of this court, the constitutionality of the law under which the bonds of defendant in error were issued, was passed upon and adjudged valid. The case then before the court was entitled *The Town of Walnut* v. *Wade*, and is reported in 103 U. S. 683, the action being on coupons cut from bonds of the town, numbered from 1 to 300. The bonds in that case showed upon their face that they were issued under and by virtue of a vote of the people of the town, held June 25, 1870. The bonds, from which the coupons sued on in this case were cut, are numbered from 301 to 400, and show upon their face, that the election under which they were issued, was held August 6, 1870. The law did not limit the number of elections nor the amount of stock for which the town might subscribe and issue its bonds in payment therefor.

In the case cited the court says: "There was "nothing in the act which placed any limit to the amount "of stock which the town might subscribe, and the recitals "of the bonds gave no notice to the holders that the

" bonds issued exceeded the amount of stock which the " town had voted to subscribe."

Except as to the day on which the vote was taken, the bonds in this case are identical in their history with the bonds sued on in the other case. They bear the same date; were issued in consideration of stock in the same railway of the par value of the bonds; were delivered at the same time, and are held by the same owner, who paid the same price therefor. The declaration in this case alleges that they were bought by plaintiff in error, as an innocent purchaser, before maturity, for a valuable consideration, and with no notice of any defense to the same, all of which is confessed by the demurrer.

The decision in *Walnut* v. *Wade*, *supra*, may be taken and considered as *res judicata;* but the town urges that the election, not having been held until after the 2d day of July, 1870, the day on which the people of Illinois voted to ratify the new Constitution of the State, in which was incorporated an article prohibiting the granting of aid to railroads by municipal corporations, after the adoption of that constitution, the bonds are void.

This view of the law is certainly supported by the rulings of the Supreme Court of Illinois; and this court, in the *County of Moultrie* v. *Savings Bank*, 92 U. S. 632, speaks of the Constitution of Illinois going into operation on July 2, 1870, but that was mere *obiter*, and cannot be treated as a ruling of this court, as the question was not before it for its decision. This court was not considering this question at all in that case. It will be observed that all the decisions of the Illinois courts on the question of the time in which the " Municipal Aid " article of the Constitution went into effect were rendered years after the bonds sued on were issued and purchased by the present owner, and this court is not bound to follow the later rulings of the Illinois court, if it can gather from its former decisions construing its own statutes sufficient to warrant a different construction, to wit, that the "Municipal Aid" article did not go into effect until August 8, 1870, when the body of the Constitutton was and is treated as having been adopted. This court has deemed it proper on other occasions to differ in judgment from the Supreme Court of Illinois, especially upon questions growing out of the issuing of railroad aid bonds, and plaintiff in error herein asks this court to examine and pass upon the issues in this case as an original proposition.

On the 13th day of May, 1870, the delegates to a State convention, regularly called to amend or revise the Constitution of Illinois of 1848, or to frame a new organic law for the State, concluded its labors by submitting to the people of that State, for their ratification or rejection, an entirely new constitution, several articles of which to be voted on separately, with a schedule consisting of some twenty-six sections. One of the separate articles reads thus: "No county, city, town, "township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private "corporation, or make donations to or loan its credit in "aid of such corporation: *Provided, however*, that the "adoption of this article shall not be construed as affecting the right of any such municipality to make such "subscription where the same has been authorized under "existing laws by a vote of the people of such municipalities prior to such adoption."

The schedule sets forth, in its preamble: "That no "inconvenience may arise from the alterations and amendments made in the Constitution of this State, and to "carry the same into complete effect, it is hereby ordained and declared:

§ 1. "That all laws in force at the adoption of this "constitution, not inconsistent therewith, and all rights, "actions, prosecutions, claims, and contracts of this State,

" individuals, or bodies corporate, shall continue to be as " valid as if this Constitution had not been adopted."

§ 8. Fixes July 2, 1870, as the day of election to ratify.

§ 11. Constitutes the State Auditor, Treasurer, and Secretary of State, or any two of them, a board of canvassers to count the votes in the presence of the Governor, and that the Governor, by public proclamation, should announce the result of the canvass; and twenty-five days are allowed in which to make return of the ballots and count the same.

§ 12. " If it shall appear that a majority of the votes " polled are for the new Constitution, then so much of this " Constitution as was not separately submitted to be voted " on by articles and sections, shall be the supreme law of " the State of Illinois, on and after Monday, the 8th day " August, A. D. 1870; but if it shall appear that a " majority of the votes polled were against the new Con-" stitution, then so much thereof as was not separately " submitted to be voted on by articles and sections shall " be null and void."

* * * * * * *

" If a majority of the votes polled are for either of " the sections separately submitted, relating respectively " to the Illinois Central Railroad, Minority Representation, " Municipal Subscriptions to Railroads or private corpora-" tions, and the Canal, then such *of said* sections as shall " receive such majority, shall be a part of the constitution " of this State."

§ 25. " In case this constitution and the articles and " sections submitted separately be adopted, the existing " constitution shall cease in all its provisions."

The canvass of votes was concluded by the board of canvassers, on or about July 27, 1870, and it was found that the people of the State had, by a majority, voted in favor of the entire constitution, including the separate articles, and at the same time Governor Palmer issued his proclamation announcing officially the result of the vote, and that, on August 8, 1870, the new constitution would go into effect and would become the organic law of the State.

The following is the text of the Executive

PROCLAMATION.

STATE OF ILLINOIS,
DEPARTMENT OF STATE.

JOHN M. PALMER, *Governor of Illinois.*

Pursuant to the provisions of section eleven of the Schedule of the Constitution, adopted by the people of the State of Illinois on Saturday, the second day of July, A. D. 1870, I, John M. Palmer, Governor of the State of Illinois, do hereby proclaim, that on the twenty-seventh day of July, A. D. 1870, the official abstracts of the votes cast on the said second day of July, A. D. 1870, by the electors of the several counties of the State of Illinois, for and against the adoption of the proposed new Constitution of the State of Illinois, and for and against the adoption of the several articles separately submitted therewith, were duly canvassed by the Secretary of State, Auditor, and Treasurer of State, in my presence, and that the result of said canvass was as follows:

For the New Constitution, there were	134,227 votes
Against the New Constitution	35,443 votes
For the sections relating to railroads in the article entitled "Corporations"	144,750 votes
Against the sections relating to railroads in the article entitled "Corporations"	23,525 votes
For the article entitled "Counties"	136,815 votes
Against the article entitled "Counties"	31,644 votes
For the article entitled "Warehouses"	143,533 votes
Against the article entitled "Warehouses"	22,702 votes
For three-fifths vote to remove county seats	127,077 votes
Against three-fifths vote to remove county seats	41,417 votes
For the section relating to the Illinois Central Railroad	147,032 votes
Against the section relating to the Illinois Central Railroad	21,310 votes
For the section relating to minority representation	99,022 votes
Against the section relating to minority representation	70,080 votes
For the section relating to municipal subscriptions to railroads or private corporations	134,114 votes
Against the section relating to municipal subscriptions to railroads or private corporations	34,061 votes
For the section relating to the Canal	142,540 votes
Against the section relating to the Canal	27,017 votes

And it further appearing, from said abstracts, that a majority of the votes cast were for the adoption of the proposed Constitution, and for all the several articles separately submitted therewith;

Now, therefore, I, John M. Palmer, Governor of the State of Illinois, do further proclaim, that on and after the eighth day of August, A. D. 1870, the aforesaid Constitution, and the articles submitted therewith, will become the supreme law of the State of Illinois.

{ SEAL OF STATE OF ILLINOIS. }

In testimony whereof, I have hereunto set my hand, and caused the great seal of State to be affixed.

Done at the city of Springfield, this twenty-seventh day of July, A. D. 1870, and of the Independence of the United States the ninety-fifth.

JOHN M. PALMER.

By the Governor:

EDWARD RUMMEL, *Secretary of State.*

UNITED STATES OF AMERICA, }
STATE OF ILLINOIS. } SS.

OFFICE OF SECRETARY.

I, Henry D. Dement, Secretary of State of the State of Illinois, do hereby certify that the foregoing is a true copy of a proclamation issued by the Governor of Illinois, as the same appears upon the records now on file in this office.

[SEAL OF ILLINOIS.]

In witness whereof, I hereto set my hand and affix the great seal of State, at the city of Springfield, this 5th day of *December*, A. D. 1881.

HENRY D. DEMENT,
Secretary of State.

In this we have a contemporaneous construction of the time in which the Constitution should go into effect, in all its parts, and by an officer of State specially delegated with authority by the convention itself to proclaim the fact, and, governed by the rule laid down in *Cooley on Constitutional Limitations, p. 67*, is conclusive.

On September 24, 1870, the Governor issued his second proclamation apportioning the State into senatorial districts, as provided for in the new Constitution, and in that paper speaks officially of the "new Constitution of the State of Illinois, adopted July 2, 1870, and in force August 8, 1870."

It would seem clear that the framers of the Constitution intended that the official count and the Executive proclamation should take place at least before the going into effect of any part of the Constitution, as it would be an absurdity to act under a law until it was determined in some official manner that the law had passed and had received legal official recognition. Further, that in making a radical change in the fundamental law of the State, a proper period should elapse after the election, in which to determine the result of the vote and to prepare for the new order of things, and August 8, 1870, was determinately fixed as that date. It is a fair interpretation of the Constitution, to say that its framers intended that this official count and Executive proclamation should stand for and operate the same as the signatures of the President of the Senate and Speaker of the House, with the Governor's signature of approval, to an ordinary legislative act; and we argue that without this official count and the proclamation of July 27, 1870, the labors and results of the convention never would have superseded the Constitution of 1848. If these things are true, how can the conclusion be avoided, that no part of the Constitution could have gone into force until after the proclamation of July 27, there being nothing in the Constitution itself making it, or any part, retroactive?

Thus there are two reasons in the record why August 8, 1870, was the day on which this new law should go into effect. 1st. By the terms of section 12 of the schedule; and, 2d, by the terms of the Executive proclamation of July 27, which was a necessary condition precedent to the full enactment of the law.

The first part of section 12 of the schedule says that on and after August 8, 1870, the new Constitution shall be the supreme law of the State, if passed by the necessary majority, independent of the articles submitted separately; and further on it says, that if a majority of the votes polled shall be in favor of the article on " Municipal sub-

" scriptions to railroads or private corporations," then that the same "shall be a part of the Constitution of this State." The words "shall be" import futurity.

The separate article on "Minority Representation" is placed in the same category with "Municipal Subscriptions," and the same rule of construction must be applied to it.

This being true, had there been an election for representatives to the Legislature at any time under existing laws, prior to August 8, 1870, how could the benefits, or rather privileges, of that article have been available, for the reason that by the terms of section 13 of the schedule the Governor and Secretary of State were directed to redistrict the State under the provisions of the Constitution itself, which did not go into effect until August 8, in order to make the minority system practicable, and September 23, 1870, was fixed as a limitation as to the time when the Executive should make this apportionment and announce the result thereof by proclamation. There was no such election, and the members of the convention knew it, but the conditions of that article were such that it could not become operative until after August 8, and serves to illustrate the construction which must be put on the time in which the "Municipal Aid" clause must have become operative.

Section 25 of the schedule says that "In case this "Constitution and the articles and sections submitted "separately be adopted, the existing Constitution"—that of 1848—"shall cease in all its provisions."

This, taken in connection with section 12, fixes August 8 as the day for the new Constitution to go into effect.

We must take the whole instrument together in order to arrive at an intelligent interpretation of its meaning.

Section 25 abrogates the Constitution of 1848, with all of its amendments. To say that the article on "Municipal Subscriptions" went into force on July 2, 1870, it then became a part of the Constitution of 1848 immedidiately, because the Constitution of 1870 was not in *in esse* until August 8, 1870, and by its terms nullified the Constitution of 1848, including this "Municipal Aid" clause if it became a part of it. This would lead to an absurdity. In construing laws, courts will give the most reasonable construction to them, and attribute intelligence to legislators rather than ignorance.

When that part of section 12 relating to "Municipal Subscriptions," "Canal," etc., reads if these articles receive a majority of votes, they shall be a part of the Constitution of the State, what Constitution does it refer to? If to the Constitution of 1870, that instrument did not become operative until August 8. If to the Constitution of 1848, as of July 2, then we have the following condition of things, to wit:

On the morning of July 2, the Constitution of 1848; in the evening—at the closing of the polls (although no one knew the fact)—we had this same Constitution of 1848 as our fundamental law, with the articles of the new Constitution, separately submitted to the people, as a part thereof; and thus, under the Constitution of 1848 as amended, we lived up to August 8, 1870, when the new Constitution came into being which annulled and set aside the Constitution of 1848, with all that pertained thereto.

It cannot be said that these separate articles were designed to be parts of two independent and antagonistic constitutions. They could not attach to both, nor could they become part of the new until the new had an existence.

There was no reason why these articles should be in force before August 8, 1870. There was no danger that between July 2 and August 8 the municipalities of Illinois would be bankrupted by the creation of new corporations seeking municipal aid. No apprehension of this kind was felt. The Legislature was not in session, and would not be until January 1, 1871.

The article on " Municipal Aid" made special provision for granting aid to existing railroads under laws in force, and any vote of the people in pursuance of such laws prior to the going into effect of the article, and as a matter of fact a large number of towns in Illinois, desiring railroads to be constructed through them under existing laws, immediately called elections, in anticipation of this article becoming a prohibition after August 8, to vote aid, and we find that a great many elections were held for that purpose between July 2 and August 8, 1870, and hundreds of thousands of dollars in bonds were issued and sold in pursuance of such votes, and the railroads were built with the money thus raised.

Another peculiarity is observable. Bonds executed in pursuance of these votes were not executed and delivered until in 1871 and later, thereby affording ample time to the towns, had they felt themselves aggrieved, to restrain their issue; but nothing of the kind was done.

In the case at bar, the vote was taken August 6, 1870; the bonds were executed on or before January 1, 1871, and bear date as of that day. They were delivered to the railway about February 1, 1871. In September, 1871, they were placed on the New York market and sold in the regular order of business to defendant in error for 97 cents on the dollar. Interest was duly paid until 1875. In the meantime the road had been constructed and was in operation, depots had been built, in a large measure out of money realized from the sale of these bonds; the town had received the consideration for its bonds in the stock of the company, besides having a railroad at the door of each of its citizens, and then, under the advice of eminent legal counsel, the Illinois Supreme Court having decided *Schall* v. *Bowman*, it elected to keep all it had received and repudiate its debt, throwing the loss, if any, upon the purchaser of its bonds, which the town and its officers deliberately executed, and had registered with the State Auditor, with the seal of State attached as a guaranty that purchasers would be fully protected in their investment.

If counsel shall argue that the " Municipal Aid " article was adopted on July 2, 1870, then I contend that the whole Constitution of 1870 was adopted on the same day, and the Constitution of 1848 became at once a nullity.

But the Constitution of 1870, by its terms, did not become the supreme law of the State until August 8, 1870. If, then, these four articles separately submitted were in full force and effect at the time they were ratified by the people on July 2, and the Constitution of 1848 became null and void the same day, then we have from July 2 to August 8, as the organic law of the State, simply the articles on " Illinois Central Railroad," " Municipal Subscriptions," " The Canal," and " Minority Representation." In other words, the fundamental law of the State for that period was:

1. That the Illinois Central Railroad must continue to pay into the State treasury, for the use of *the people*, the proportion of its revenues designated in its charter.

2. That no municipality should ever aid a railroad corporation and *the people* be taxed to pay the same.

3. That the Illinois and Michigan Canal should never be sold or leased without a vote of *the people*.

4. That, under the ' Minority Representation " article, one out of three delegates to the House of Representatives might be elected out of the political party in the minority in each district—a political concession to the minority party of *the people* in each Senatorial District of the State.

Happy people! During those days every man could be his own lawyer. The law being wholly on the side of *the people*, no interpretation was necessary.

Section 12, article 9 of the Constitution of 1870, and which is no part of the separate articles voted on, provides for the issuing of bonds in payment of corporate debts incurred by a vote of the people "prior to the "adoption of this Constitution, in pursuance of any law "providing therefor," and under such conditions the new Constitution, prohibiting the levying of a greater than five per cent. tax, was not operative.

It is inconsistent with every rule of interpretation to fix any other date than August 8 for the going into complete operation of this whole Constitution, including the separate articles voted upon on July 2, 1870.

Not only have the people of many towns in Illinois acted upon the theory that elections could be held at any time before August 8, 1870, to vote aid to railway enterprises already chartered, but they followed the officers of State in that opinion. The votes of July 2 were canvassed by the Secretary of State, Auditor and State Treasurer, in presence of the Governor, on July 27, 1870, being the earliest moment that it could be done under the provisions of section 11 of the schedule, and the earliest moment that it was officially known that the new Constitution had been ratified by the people; and on that date—July 27th—Governor Palmer issued his proclamation, in which he said:

"And it further appearing from said abstracts that a "majority of the votes cast were for the adoption of the "proposed constitution, and all the articles separately "submitted therewith;

"Now, therefore, I, John M. Palmer, Governor of "the State of Illinois, do further proclaim that on and "after the 8th day of August, A. D. 1870, the aforesaid

" constitution and the articles submitted therewith, will
" become the supreme law of the State of Illinois."

The words "ratification" and "adoption" are often used as synonymous terms. The word "adoption," however, taken literally, has a different meaning. In its fullest sense it comprehends something that is complete, finished. A child is adopted when all the legal formulas have been conformed with under the laws of the State in which the adoption takes place. To adopt another's views is to make those views wholly one's own.

The vote of July 2, 1870, was not an adoption of the Constitution of 1870, but a mere ratification. The Constitution became adopted after the count or canvass of the ballots; the Governor had promulgated his proclamation, and August 8 had arrived, the day fixed by the delegates in convention for the Constitution to go into force.

The word "adoption" is frequently used in the instrument. For instance, in section 12, article 9; in the Municipal Aid act; and several places in the schedule and body of the instrument. Inasmuch as the word is used in so many places, I cannot construe it as meaning anything else, as to time, than as the words of section 12 of the schedule, when it says, "shall be the supreme law of the
" State of Illinois on and after Monday, August 8, 1870,"
and "then such of said sections as shall receive such ma-
" jority shall be part of the Constitution of this State."

Connecting this with section 25 of the schedule, which says, "In case this Constitution and the articles and sec-
" tions submitted separately be adopted, the existing Con-
" stitution shall cease in all its provisions," I am forced to the conclusion that the Constitution of 1870 had no operation or force as law, in any of its parts, until August 8 of that year, when it became, as a whole, the organic law of the State, superseding all others; and that until that date the Constitution of 1848 was in full force and effect,

the fundamental law, and untrammeled by any of the provisions of that of 1870; and all acts done prior to August 8 were done under the privileges and restrictions of the law as in force on the morning of July 2, before a single ballot was cast.

To make the article on "Municipal Aid" retroactive so as to be in force on July 2, 1870, would be to invalidate the bonds sued on herein, which were voted August 6, 1870, and does violation to section 1 of the schedule, which is a guaranty that all acts done prior to August 8 shall be binding on the parties in interest.

Under the Constitution of 1848; the charter of the Illinois Grand Trunk Railway and amendments thereto; and the votes of the electors of Walnut on August 6, 1870; the right to issue these $10,000 additional bonds in payment for stock subscribed by it and, in fact, received, became fixed, and power did not lie in the people of the State of Illinois to invalidate the bonds.

This first section of the schedule should be treated in connection with other parts of the Constitution relating to municipal obligations. In *Manly* v. *The State*, 7 Maryland, 147, the court says: "Constitutions are not "to be interpreted according to the words used in partic-"ular clauses. The whole must be considered, with a "view to ascertain the sense in which the words were "employed, and its terms must be taken in their ordinary "and common acceptation, because they are presumed to "have been so understood by the framers, and by the "people who adopted it."

To the same effect is *The People* v. *Potter*, 47 N. Y. 377; *People* v. *Supervisors*, 3 Barb. 332; *Cooley on Constitutional Limitations, pp. 57, 58.*

Let us look at the question in another form. Is there anything in the Constitution of 1870 which could possibly be construed into meaning that these articles voted upon separately could attach to and become parts of two distinct Constitutions, to wit, those of 1848 and 1870? If they were in full force and effect on July 2, 1870, they became part of, and were attached to, some body. They never were designed to stand alone. They could not become attached to the Constitution of 1870, because that instrument had no existence on that date. If they became attached to the Constitution of 1848 on July 2, 1870, then on August 8, 1870, they were either made void, and never had any force or effect thereafter, as I have already argued, or else they were detached from the Constitution of 1848 on that day, and attached to the Constitution of 1870.

If such a theory is capable of demonstration from the Constitution itself, or from any authorities on the interpretation of legislative or constitutional enactments, that these articles became a part of the Constitution of 1848 on July 2, remained in full force and effect as part of that instrument up to August 8, and were then detached and made a part of the Constitution of 1870, I have utterly failed to discover it.

In this argument I have assumed the court will inquire into the question for itself, and see if, peradventure, the Supreme Court of Illinois may not have violated higher constitutional rights of the plaintiff in error in its rulings upon our State Constitution touching the matter in controversy. No rules of reciprocity existing between the State and Federal courts are so rigid as to compel the Federal courts to follow the rulings of the State courts upon the construction of their own laws, without first inquiring whether or not the State courts have been consistent, and also whether or not a violation of the Federal Constitution may not be the result of such construction.

If this town had power to issue its bonds under the Constitution of 1848, the charter of the railway and a vote of the people at any time prior to the adoption of the new

Constitution, the restriction upon the exercise of that power by the new Constitution cannot impair any right acquired under the power. *Slack* v. *Maysville & L. R. R. Co.*, 13 B. Monroe, 17; *Cochran* v. *Taylor*, 13 Ohio, 384.

Unless the Constitution, directly or by implication not to be misunderstood, repeals the law under which the bonds of the defendant in error were issued, then that law would have enabled the town to vote for bonds, even after the going into effect of the new Constitution. To this effect are *Cass* v. *Dillon*, 2 Ohio St. 611; *The State* v. *Trustees*, 8 Ohio St. 394; *State, ex rel.* v. *Macon Co.*, Ct. 41, Mo. 461, and the several cases cited thereunder.

This point, however, need not be elaborated or argued at length, for the reason that the vote was taken on August 6, and, except as to the taking the necessary steps to have the Constitution voted upon, the official returns and canvass, with the Executive proclamation of the result, no part of the Constitution had any operative force until August 8, 1870.

By the terms of section ~~12~~ 26 of the schedule, the provisions of the Constitution " required to be executed prior " to the adoption or rejection thereof, shall take effect and " be in force immedtately." Counsel may argue that this section relates to the separate articles on " municipal subscriptions," " canal," etc., but that would make no sense. How could these sections be " executed immediately?" What requirements that they should go into " immediate effect?" Under the provisions of the Constitution, certain things had to be done, even before July 2, the day of election, and to those things section 26 refers. The convention adjourned May 13, 1870. It became necessary immediately to make preparations for the coming election; notices had to be given, etc. The election itself had to be held. This was not held immediately, but it followed in order the adjournment and the preliminary steps preparatory to the election. After the election was held, twenty days were given the several county clerks to make returns of the election to the seat of government. Five days more were given the State officers, in which to canvass the ballots, upon which the Governor was required to issue his proclamation announcing the result. All these proceedings were absolutely necessary as conditions precedent to the adoption of the Constitution, and are "the provisions of this Constitution" referred to in section 26 of the schedule, which should "take effect and be in force immediately."

Sections 12 and 25 of the schedule establish the date when the new Constitution, in all its parts, should become the supreme law of the State, and that of 1848 cease to exist; and a good reason for this, if none other existed, was expressed by the framers in the preamble and section 1 of the schedule, to wit: "That no inconvenience might "arise from the alteration, and amendments made in the "Constitution of this State."

"And that all laws in force at the adoption of this "Constitution, not inconsistent therewith, *and all rights,* "*actions and prosecutions, claims and contracts* of this "State, individuals or bodies corporate, shall continue to "be valid, as if this Constitution had not been adopted."

In *Supervisors* v. *Keady et al.*, 34 Ill. 295, the court says: "The court is not aware of any rule by which an "act of the Legislature regulating the rights and duties "of citizens becomes a law piecemeal upon the performance of acts *in pais*, known only to a limited number of "persons, for the purpose of subserving the exigencies of "the inhabitants of a particular locality."

This "Municipal Aid" clause could only have been possibly applicable to but a few of the towns in the entire State at the time.

The Illinois court laid down a very wholesome rule of construction in *Harding* v. *R., R. I. & St. L. R. R. Co.*, 65 Ill. 93, when it said:

"The intention of the Legislature must always be "presumed to be in consonance with reason and good "discretion, and a repeal by implication, or a particular "construction, should never be indulged in, which would "lead to an absurd consequence, or stamp the legislation "as wholly unreasonable, if such results can be avoided."

In *Perteet* v. *The People*, 65 Ill. 232, the court says: "It is a rule that the most natural exposition of a statute "is to construe one part with another part of the same "statute, and thus, from a view of the whole, discover "the meaning."

Compare, also, *Way* v. *Way*, 64 Ill. 410, and *State* v. *Commissioners*, 37 N. J. L. 228.

The question we have to meet in this case is, when did the Constitution of 1870 go into force and become the organic law of the State, repealing every other?

There is no more sacredness surrounding a Constitution than any other law enacted for the government of a people.

All the formulas for its creation must be observed, as are required for an act of the Legislature. True, these formulas are not the same, but their omission would be as fatal to the Constitution becoming law.

It must be ratified by the people in manner pointed out by the framers. If the requisite notice was not given of the election in conformity with the provisions for giving notice, and the election held on the day appointed, no court would sustain its validity, any more than it would an act of the Legislature irregularly enacted.

Following the vote, a canvass must be made of the votes by persons designated for that purpose, and none other. Then there must be some authentication or official recognition of the Constitution. All this takes time, and what sense is there in saying that before these necessary conditions are performed the people are amenable to the law?

" An act of the legislature is passed only when it has " gone through all the forms made necessary by the con- " stitution to give it force and validity, as a binding rule " of conduct for the citizen."

Wartman v. *The City*, 33 Penn. St. 208.
See, also, *Charless* v. *Lamberson*, 1 Iowa, 443.
Bennett v. *Bevard*, 6 Iowa, 89.
Logan v. *State*, 3 Heisk. (Tenn.), 442, as to when statutes go into effect.

In *McCutcheon* v. *The People*, 69 Ill. 604, the court announces a rule of construction, before that treated as a sound rule, that where the legislature of one State adopts a statute of another State, it will also follow the interpretation of the statute thus borrowed, as given by the courts of the State from which the statute was copied.

By article 11, § 3 of the Constitution of Iowa, of 1857, a limitation was placed upon the power of municipalities to become indebted. The election to ratify the constitution was the regular election, which fell on Aug. 3, 1857.

Article 12 of the Schedule, sec. 13, Constitution of Iowa.

By the terms of this section the new constitution was to be the organic law of that State, when the votes should be counted and the Governor should issue his proclamation announcing the result of the election, if ratified. This proclamation was issued Sept. 5, 1857. On Aug. 6, 1857, after the election, and before the proclamation, the city of Davenport made a contract for lighting its streets, the payment of which would increase the assessments to an amount beyond the constitutional limit; but the Supreme Court of that State, in *Davenport Gas Co.* v. *The City*, 13 Iowa, 233, held the contract valid.

Compare *Scott* v. *The City*, 34 Iowa, 208.
White v. *Hart*, 13 Wall. 646.
Thompson v. *Alexander*, 11 Ill. 142.
McHoney v. *Trustees*, 68 Ill. 142.

The courts of New York have been called upon to determine the time when the judiciary article of the proposed new Constitution of that State of 1869 went into effect. This judiciary article was voted on separately.

The new Constitution, if ratified, was to be in force, by its terms, on Jan. 1, 1870. At the election the Constitution was rejected, but the judiciary article was accepted. In *Real* v. *The People*, 42 N. Y. (3 Hand), the Court of Appeals says that the election was deemed incomplete until its result was declared by the canvassers, and that the judiciary article did not become operative until Jan. 1, 1870, the day fixed for the entire Constitution to go into effect, had it been ratified by the people.

For further authorities as to the time at which laws can be considered as adopted and in force, the following are in point:

The People v. *Gardner*, 45 N. Y. 816.
The People v. *Norton*, 59 Barb. 169.
The People v. *Gardner*, Ibid, 205.
Richter v. *Poppenhauser*, 42 N. Y. 377.

I assume counsel will set up the rulings of the Supreme Court of Illinois, in which that tribunal has judicially determined, that as to the "Municipal Subscription" article of the State Constitution of 1870, the same went into full force and effect on July 2, 1870; and then cite the rulings of this court, wherein it has announced as a rule of interpretation, that it will follow the rulings of the highest court of the State whenever a question arises as to the meaning of its own Constitution and laws. But this rule only extends to such cases where the rulings of the State courts have been in harmony with their previous rulings on the questions in controversy.

At the time the bonds sued on in this case were issued, to wit, on January 1, 1871, no construction had been given the Constitution of the State, except that given by the Governor by his proclamation; and in April, 1871, when the bonds were presented to the State Auditor for registry, that officer, who had been one of the Board of Canvassers at the late constitutional election, passed these bonds and authenticated them by his certificate and seal of State. Interest was duly paid by the town, which recognized their binding effect upon the town, and not until years after did the State Supreme Court give respectability to repudiation by declaring such bonds invalid.

If this view of the case is correct, the plaintiff in error has acquired vested rights under the Constitution of the United States, which cannot thus lightly be taken away from him.

Thus have I endeavored to show from our Constitution itself, and judicial opinions, that it did not go into effect, as to any part thereof, until August 8, 1870. If this court shall be satisfied that this was the intent and meaning of the framers of the Constitution, it cannot hesitate to reverse the rulings of the Circuit Court and send this case back for further hearing.

But should this court elect not to enter upon this question at all, and to accept the rulings of the Illinois court as final and conclusive, and, further, that the first point of *res judicata* cannot be sustained, what effect ought the further fact to have upon the question of the obligation of this town to pay this debt, because it has always held, and still does hold the consideration given for the bonds—that is to say, ten thousand dollars in the capital stock of the railway?

It is true that the party suing is not the railway with which the town made its contract and from which it received the certificate of stock in the railway. In another sense, however, the transaction was between the plaintiff and defendant in this case. As a matter of fact, the officers representing the railway acted merely in the capacity of agents to put the bonds on the market, the money from the sale of the same going directly into the building of the road and its depots.

The legally constituted officers of the town, with the knowledge and consent of the people of the town, have authenticated the bonds by their signatures, and the State Auditor, under his hand and seal of office, further placed the marks of legality and honesty upon the bonds. The town, by its officers, and through its people, for some years regularly levied and collected taxes to pay interest coupons on these bonds, and if there ever was a case wherein the doctrine of estoppel was invoked and allowed, it is this; and as authority for sustaining them, the cases of *Knox County* v. *Aspinwall*, 21 How. 539; *Bissell* v. *Jeffersonville*, 24 How. 287; *Moran* v. *Commissioners*, 2 Black, 732; *Mercer Co.* v. *Hackett*, 1 Wall. 83; *Van Nortrup* v. *Madison City*, 1 Wall. 291; *Stephenson* v. *Schenck*, 5 Wall. 772; *Pendleton Co.* v. *Avery*, 13 Wall. 305, and others running through the reports of this court, and recognized in jurisprudence, whereever right and law are treated as synonymous terms.

Counsel for the Town will cite the decisions of the Illinois Supreme Court on its construction as to the time the "Municipal Subscription" article of the Constitution of 1870 went into operation, as appears first in *Schall et al.* v. *Bowman*, 62 Ill. 321, and followed in subsequent cases, and will assert, beyond doubt, that the doctrine of *stare decisis* will determine the action of this court.

In the history of jurisprudence there is not a doctrine fraught with more evil in its consequences than this same doctrine of *stare decisis*.

It is this doctrine, when dogmatically adhered to by the courts, that has been the cause of innumerable laws being enacted in times past, which could have been avoided, had judges exercised a sound discretion and liberality in the interpretation of laws already in existence. In these latter days, however, courts do not consider it necessary to blindly follow precedents, when those precedents are inconsistent with the enforcement of commercial honesty among men. The elementary principle is laid down by Judge COOLEY, in his work on Constitutional Limitations, at pages 48 and 49, where he says:

" But if important principles of constitutional law can " be thus disposed of in suits involving only private rights, " and when private individuals and their counsel alone are " heard, it becomes of interest to know how far, if at all, " other individuals and the public at large are affected by " the decision; and here it will be discovered that an en- " tirely different rule prevails, and that a judicial decision " has no such force of absolute conclusiveness as to other " parties, as it is allowed to possess between the parties to " the litigation in which the decision has been made, and " those who have succeeded to their rights."

Courts are established and maintained for the purpose of adjusting and settling the rights of parties who cannot or will not settle such rights between themselves. In construing rules of property or of legislation, each case brought before the courts is entitled to a patient hearing upon its own merits, and if some precedent or harsh rule of construction of an act of a legislature or a constitution would defeat justice and work wrong, then it is no reflection upon other judicial tribunals to disregard such precedents and change the rule of construction.

It does not seem that sufficient consideration was given by the Illinois court to the question under discussion, nor could it have reflected upon the influence of its decision as a prompter to repudiation by every municipality in the State, that had subscribed stock to railways and issued bonds to pay for the same between July 2 and August 8, 1870.

Relying upon the words of the Constitution itself, the official authentication of it by the Governor of the State, and the deliberate acts of the people of the town of Walnut and its officers, with the endorsement of the State Auditor, verified by the seal of the State, these bonds were bought in open market at nearly their face value. Interest was regularly paid until the majority of a divided court declared such bonds invalid, and then payment was suspended.

The court will observe that two of the members of the Illinois court dissented from the opinion in the *Schall* v. *Bowman* case, showing that the ruling was not, in their estimation, in conformity with their understanding of the terms of the Constitution itself.

We claim that the plaintiff in error has vested rights which cannot be taken away from him, and respectfully ask this court to scrutinize the Constitution of Illinois for itself, together with the authorities on the construction of Legislative proceedings, by our own and other courts, as a guide to the construction which ought to be placed upon the municipal subscription article of this constitution, as to when it went into operation, and determine the issues as an original question wholly within the jurisdiction of this court, and decide as its judgment may dictate

THOMAS S. McCLELLAND,
Counsel for Plaintiff in Error.

GEO. A. SANDERS,
Attorney for J. H. Wade.

FILED
JAN 23 1882
JAMES H. McKENNEY

IN THE

Supreme Court of the United States,

(No. 239.)

OCTOBER TERM, A. D. 1881.

J. H. WADE, *Plaintiff in Error,* *vs.* THE TOWN OF WALNUT, *Defendant in Error.*	Error to the Circuit Court of the United States, Northern District of Illinois.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

THOMAS S. McCLELLAND,

Counsel for Plaintiff in Error.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1882.

IF THE COURT PLEASES.

Since preparing and filing my brief in this cause, it has occurred to me that a reference to the statute of Illinois, entitled " An act to provide for calling a convention " to revise, alter or amend the Constitution of the State " of Illinois," approved February 25, 1869, and found in the Session Laws of 1869, at page 97, together with some references to the manner in which constitutions of other States were put into operation, might be of aid to the court in arriving at a satisfactory conclusion, and might throw some light upon the questions under discussion in this case. At the same time I desire to urge the importance which I attach to the contemporary construction given to our Constitution of 1870, as to the time it went into force in all its parts, first, by the Governor and other State officers; second, by the people who acted upon their understanding; and third, by Gross, Hurd, and Cothran, and officers of State who have published the Constitution independently or in revised editions of the State statutes since 1870, all of whom have fixed August 8, 1870, as the date upon which our Constitution went into force.

LEGISLATIVE ACTION CALLING A CONSTITUTIONAL CONVENTION.

The initial movement for the calling of a Constitutional Convention in 1869, and the sole guide to their action after the delegates to the convention had assembled, is found in the above act of February 25, 1869.

The only section relating to the powers of the convention and its methods of procedure is number five, which is as follows :

> 5. The proceedings of said convention shall be filed in the office of the Secretary of State, and the amendments, revisions, or alterations to the Constitution agreed to by the said convention shall be recorded in his office. The said amendments, revisions, or alterations shall be submitted by the convention to the people, for their adoption or rejection, at an election to be called by said convention; and every person entitled to vote, by the Constitution and laws in force at the time fixed for said election, may vote on the question of adopting or rejecting said alterations, revisions or amendments; but each voter shall vote only in the election precinct or district in which he shall, at the time, reside, and be entitled to vote there, and not elsewhere. And said amendments, revisions or alterations shall not take effect unless adopted by a majority of the legal voters voting at such election. The amendments shall be so prepared and distinguished, by numbers or otherwise, that they can be voted upon separately, unless the convention shall be of the opinion that it is impracticable. In either case, the convention shall prescribe the form or manner of voting, the publication of the alterations, revisions or amendments, and the notice to be given of the election. At the election mentioned in this section, the judges of election shall receive the votes in the form to be prescribed by said convention; and all the provisions of the laws of this State, then in force, in relation to election of officers at a general election, shall apply to the voting upon said amendments, or alterations, so far as the same can be made applicable thereto; and the votes given upon said alterations or amendments shall be given and canvassed, and all proceedings shall be had in regard to them, as nearly as practicable, in the manner prescribed by the laws then in force in respect to votes given for Governor: *Provided*, said convention may fix upon any other manner of canvassing the votes for or against said amended Constitution, and shall provide the way or manner for its taking effect after it shall have been adopted by the people.

The proviso to this section gives plenary power to the convention to establish a date for the going into effect of the constitution at a time subsequent to the day of the election to ratify, when it says : "Said convention may fix upon any other manner of canvassing the votes for or against said amended constitution, and *shall provide the way or manner for its taking effect,* AFTER *it shall have been adopted by the people,*" and in my judgment this proviso is the key to the action of the convention in fixing August 8 as the day for the constitution to go into force, that ample time might elapse after the election for the necessary canvass and proclamation, and "That "no inconvenience might arise from the alterations and "amendments made in the Constitution of this State, and "to carry the same into complete effect," as set forth in the preamble to the schedule of the constitution itself, and for the people to adjust themselves to the new order of things.

PROMULGATION OF CONSTITUTIONS.

It may not be out of place to inquire in what manner other States have entered upon revisions, amendments or alterations to their constitutions, that is, as to fixing the time for entering upon a change in their fundamental laws.

No fixed system has ever been adopted in the United States for the promulgation of constitutions, but that some official announcement should be made before a change actually takes place in the organic law of a State or territory has been usually acted upon.

In the case of Territorial Government, the announcement is made by the President, in pursuance of an act of Congress.

In the conventions held in North Carolina, in 1835; Texas, 1845; Wisconsin, 1848, and Iowa, 1857, provisions were made for the respective constitutions of those States going into effect immediately after proclamation by the Governors, but no provisions were made for certifying election returns to that officer.

In the conventions held in New York, in 1821; Louisiana, in 1844, 1852 and 1864; Illinois, in 1847 and 1862; Michigan, in 1850; California, in 1849; Tennessee, 1834; Ohio, 1850, and Oregon, 1857, provisions were made for certifying the election returns to a Board of Canvassers, to be followed by executive proclamation before the respective constitutions should take effect as such.

In the Massachusetts convention of 1779, and the Kentucky convention of 1849, provisions were made for elections to ratify or reject the work of these conventions, and then an adjournment to a day subsequent to the election, to canvass the vote and announce the result.

In the conventions held in Massachusetts in 1820 and 1853, returns of the ratifying elections were made to the Secretary of State, the votes counted by committees of the convention, and proclamation of the results made by the Governor.

Much greater care and consideration were observed by the Illinois Convention of 1869, which framed the Constitution of 1870, for in that a day was set apart for the election to ratify; another in which returns should be made to the board of canvassers; another in which public proclamation of the result of the election should be made by an existing officer of government; and still another on which the Constitution should go into operation, each following the other in a systematic chronological order.

CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION.

I have already discussed the several sections of the Illinois Constitution of 1870, which throw light upon the question as to when it became the organic law of the State. If there is any doubt as to the meaning of the text, then resort should be had to contemporaneous construction as a guide by which the court should be governed.

The doctrine, as laid down by Judge COOLEY, addresses itself to one's mind as sound in principle, and the text found in his work on *Constitutional Limitations*, at page 67, is authority to control the main question involved in this case. He says:

> An important question which now suggest itself, is this: How far the contemporaneous construction, or the subsequent practical construction of any particular provision of the constitution, is to have weight with the courts when the time arrives at which a judicial decision becomes necessary. Contemporaneous construction may consist simply in the understanding with which the people received it at the time, or in the acts done in putting it in operation,

and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding when nothing has been done under the provision in question, must always necessarily be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist.

Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. Especially where this has been given by officers in the discharge of their duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight.

Following this text Judge COOLEY cites and comments upon

Stewart v. *Laird*, 1 Cranch, 299.
Martin v. *Hunter's Lessees*, 1 Wheat. 351.
Cohens v. *Virginia*, 6 Wheat. 418.
Bank of U. S. v. *Halstead*, 10 Wheat. 63.
Ogden v. *Saunders*, 12 Wheat. 290.

Further on, at page 69, Judge COOLEY says:

"Great deference has been paid in all cases to the "action of the executive department, where its officers "have been called upon, under the responsibilities of their "official oaths, to inaugurate a new system, and where "it is to be presumed they have carefully and con-"scientiously weighed all considerations, and endeavored "to keep within the letter and spirit of the Constitution. "If the question involved is really one of doubt, the force "of their judgment, especially in view of the injurious "consequences that may result from disregarding it, is fairly "entitled to turn the scale in the judicial mind," and cites a large number of cases in support of this view.

This being the law, how can the conclusion be avoided that the Constitution of Illinois, as voted upon July 2, 1870, had no force or effect until August 8, as announced by the Governor in his proclamation of July 27, 1870. I have already alluded to the construction put upon the Constitution by the people of Walnut themselves, in calling the election to vote this additional $10,000 bonds on August 6, in payment of an equal amount of stock in the railway, they well knowing that two days later they would be divested of the power to vote bonds for such purpose.

In conclusion, I wish to direct the attention of the Court to the manner in which the officers of State, in issuing State editions of the Constitution of 1870, also in their official certificate, also in the copies, as appear in the general Revised Statutes of the State, compiled by Hurd, Gross and Cothran, this instrument is spoken of, not that I attach any conclusive significance to the fact, but as illustrating the general impression on the minds of the people of the State of Illinois, as to the date the new Constitution went into force and became the supreme law of the State.

Except as found in the rulings of the Supreme Court of Illinois, we universally find the constitution mentioned and treated as—

"Adopted in convention May 13, A. D. 1870."
"Ratified by the people July 2, 1870."
"In force August 8, 1870."

THOMAS S. McCLELLAND,

Of Counsel for Plaintiff in Error.

FILED
FEB 7 1882

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 239.

J. H. WADE, *Plaintiff in Error,*

vs.

THE TOWN OF WALNUT, *Defendant in Error.*

WRIT OF ERROR TO CIRCUIT COURT OF UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT

OF

GEORGE A. SANDERS,
ATTORNEY FOR PLAINTIFF IN ERROR.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1882.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 239.

J. H. WADE, *Plaintiff in Error,*

vs.

THE TOWN OF WALNUT, *Defendant in Error.*

WRIT OF ERROR TO CIRCUIT COURT OF UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

STATEMENT.

The bonds from which the coupons involved in this suit were detached, were issued January 1, 1871, under an act of the legislature of the State of Illinois, entitled "An act to incorporate the Illinois Grand Trunk Railway, and amendments thereto," and in accordance with the vote of the voters of the Town of Walnut, county of Bureau, Illinois, on the 6th day of August, 1870. The coupons were for $10 each, 519, from bonds numbers 301 to 400, inclusive.

The bonds were issued ($40,000) by the Town of Walnut, defendant in error, to the railway company, in consideration of and payment of $40,000 of stock in the Illinois Grand Trunk Railway, which was subscribed for by the town, delivered by the railroad company, at the same time the bonds were executed and delivered, and the Town of Walnut still holds and owns said $40,000 of the stock it received for its bonds.

J. H. Wade, the plaintiff, purchased the bonds and coupons in September, 1871, for ninety-seven cents on the dollar, and without any notice of any defect or irregularity in their issue.

The bonds were for $100 each, and numbered from 1 to 400, and were due January 1, 1881.

In *Town of Walnut* v. *Wade*, 103 U. S. 683, this court passed upon coupons from bonds Nos. 1 to 300, and held them valid. In this case only coupons from bonds 301 to 400 are involved.

Issue was joined on demurrer filed to the declaration, the demurrer was sustained by the court below, and an appeal prayed to this court.

The questions involved in this case are:

1. Whether or not this court has not already held the instruments sued on herein valid obligations against the Town of Walnut?

2. Was the election, held August 6, 1870, under which the instruments sued on in this case were issued, illegal and void by reason of any provisions of the constitution of Illinois of 1870?

3. Having issued its bonds bearing every indication of validity, and having paid three years' interest on the same, is not the Town estopped from denying their validity?

4. If the election of August 6, 1870, was in fact unwarranted by the fundamental law of Illinois, still, are not the instruments in question subject to action in the hands of plaintiff, an innocent holder for value, upon the ground that those bonds were issued in payment of stock, and in consideration therefor, which stock was delivered to the Town, and it now holds and owns the same—can the town hold on to this consideration, and refuse to pay the debt?

ERROR.

1. The circuit court erred in sustaining the demurrer of the defendant in error to the declaration of the plaintiff in error.

2. The circuit court erred in not overruling said demurrer.

3. The circuit court erred in not finding for plaintiff in error in the court below, and entering judgment in his favor for the amount due upon the instruments sued upon.

4. The rulings of said circuit court were otherwise informal and erroneous.

BRIEF AND ARGUMENT.

May it please the court:

In the case of *The Town of Walnut* v. *Wade*, 103 U. S. p. 683, every question, save perhaps one, involved in this case, was decided by this court in favor of the validity of the coupons sued upon. The parties to the action were the same; the subject matter in controversy was the same; the plaintiff in this case paid the same price for the bonds involved in both suits; the bonds were all of the same denomination—$100 each; all issued under the same laws, and to the same railroad company; were all executed at the same time; delivered at the same time; registered by the State Auditor at the same time; dated at the same time—January 1, 1871—and all due at the same time—January 1, 1881; all bearing the same rate of interest, and the whole issue of bonds exchanged for the same amount of stock in the Illinois Grand Trunk Railway Co., at the time of their execution and delivery to the railroad company. June 25, 1870, the voters of the Town of Walnut voted $30,000 of these bonds—Nos. 1 to 300—and on the 6th of August, 1870, the same town voted $10,000 more bonds —Nos. 300 to 400—to the same railroad company. This court has held the $30,000 voted June 25, 1870, as valid obligations of the Town of Walnut, in the case above refered to, and the questions in this case are wholly as to the $10,000 voted August 6, 1870. They were all issued under the same laws, and the cases are exactly analagous, save the *date of the last election.* It is evident that the circuit court sustained the demurrer to the declaration on the ground that the election, when the vote was taken for the last $10,000 of these bonds, was held *August* 6, 1870, after the separate Article on Municipal Corporations of the Constitution of the State of Illinois of 1870 had been voted upon by the people of the State of Illinois, *July* 2, 1870. This Article forbids the voting of aid to private corporations by the municipal corporations of the State, *save such as were voted before its adoption.* The circuit court held this election *unconstitutional,* and the bonds void, because held *after the people had voted* on this Article of Amendment to constitution of 1870, which, with others, was submitted to the people for ratification separately; and yet, at the same time, the whole constitution of 1870 was submitted to the people for ratification, *July* 2, 1870. The only question in this case is one of law, the facts all being conceded by the demurrer, and all having been settled by this court, affirming the decision of the circuit court in the case of *Town of Walnut* v. *Wade, supra.*

We claim, that as the laws under which all these bonds were issued gave ample power for the issue, and did not limit the amount, that this question with all others was passed upon by this court, and is therefore *res adjudicata.*

On the 13th day of May, 1870, the delegates to a State convention, regularly called to amend or revise the constitution of Illinois of 1848, or to frame a new organic law for the State, concluded its labors by submitting to the people of that State, for their ratification or rejection, an entirely new constitution, several articles to be voted on separately, with a schedule consisting of some twenty-six sections. One of the separate articles reads thus: "No county, city, town, township, or other municipality, "shall ever become subscriber to the capital stock of any railroad "or private corporation, or make donations to or loan its credit in "aid of such corporation: *Provided, however,* that the adoption "of this article shall not be construed as affecting the right of "any such municipality to make such subscription where the "same has been authorized under existing laws by a vote of the "people of such municipalities prior to such adoption."

It is evident that the circuit court was influenced by the decision of the State Supreme Court in the case of *Schall et al.* v. *Bowman et al.*, 62 Ill. p. 321. The State Supreme Court in *Schall* v. *Bowman et al.* decide that the separate article of amendment, referring to municipal corporations and forbidding them to aid private corporations, went into effect *when the people voted on the same, July 2d,* 1870, *and not on the* 8*th day of August,* 1870, when the constitution of 1870, and the other Articles of Amendment, submitted at the same time, have been declared as operative and in force. This decision of the State Supreme Court has been affirmed by it since, in one or two cases, but we are aware of no decision of this court on that question. This court has several times alluded to the time designated by the State court, when this Article of Amendment took effect, but merely as *obiter.*

We now ask the court to pass upon this question upon its merits, and as if presented *de novo.* This involves the question whether, in this particular case, this court is bound to follow the decision of the State court, and also the *time when* this separate Article of Amendment to the constitution was adopted and became a part of the supreme law of the State of Illinois? If this court shall hold that the decision of the State court in this case is binding as an authority upon this court, which it is bound to follow, or if upon investigation of this question this court shall find that the separate Article of Amendment on municipal corporations went into effect and became operative July 2, 1870, then the issue of these $10,000 of bonds was repugnant to this Article of the constitution, and are void. But if this court shall hold, as we think it must, that that Article of the constitution of 1870, went into effect and became operative, when the constitution itself and all the other amendments did, on the 8*th day of August*, 1870, then these bonds must be held valid.

We are aware of the general rule, that this court will follow the State court decisions, where they refer to construction of their statutes and laws having a local effect only, and when there have been uniform decisions on the questions involved. But the question involved here is not a local one in its effects, nor upon a law, or statute peculiar to Illinois. It is a question involving the rights of parties guaranteed by the Federal Constitution, and such rights as the Federal courts were established to protect. It is not a question even between citizens of Illinois. It is a question between a citizen of Ohio, and the people of a municipal town in Illinois. It is local only to the municipality of the town of Walnut. It is general, in that it effects the citizens of other States' who are holding, as innocent purchasers, the bonds of this town, and a great many other towns and municipalities. It is general, inasmuch as it affects the commercial law of the nation directly; and general, inasmuch as it not only affects and decides when this particular Article of Amendment to the Constitution of Illinois went into effect and became operative, as a part of the supreme law of Illinois, but the *time when* all other Articles of Amendment to State constitutions all over the Federal Union take effect and become operative. It is, therefore, in no sense a local question, but as far-reaching in its effects as the Federal courts and the commercial laws of the Union.

Another has well said, that a leading motive to the adoption of the constitution was to make the people of all the States, one people, for commercial purposes. This object was secured by two provisions of the constitution, one providing that no State should make any law impairing the obligations of a contract, and the other that a citizen of one State might sue a citizen of another State in the courts of the Union. The constitution was designed to secure results, and whatever defeats the design of the constitution is unconstitutional.

When a citizen of one State contracts with a citizen of another State, he acquires a constitutional right to have his contract continued and enforced by the Federal courts.

The Judiciary Act provides that the laws of the several States shall be regarded as rules of decision in trials at common law, in courts of the United States "*in cases where they apply.*" But the difficult question is where do they apply? In cases of contract, the law of the State in force when the contract was made forms a part of the contract, and must be applied in the Federal courts in constructing and enforcing the contract. A decision of the State Supreme Court made *before* the contract settling the law of the State, is authority in the Federal courts without regard to whether it is sound or not in principle, because the parties must be presumed to have made their contract with reference to it. But a decision *made after* the contract was entered into forms no part of the contract, the parties not contracting with reference to such decision; and to hold such a decision binding upon the Federal court is to deny to a foreign creditor his constitutional right to have the opinion and judgment of the Federal judges upon his contract. It would be offensive and unjust for the Federal courts to say to the foreign creditor: "You may sue in our courts, if "you fear the State courts are prejudiced against your claim, but "we must decide as the State courts would, because we are bound "by all the decisions they have made since you entered into the "contract."

This contract between the parties to this suit was made in 1870, and was good and in full accord with all the laws and decisions of the State courts of Illinois at that time. In January, 1872, the *Schall* v. *Bowman* case was taken, and decision first published in 1874, which gave the first intimation to the people, that that court was of the opinion that this separate Article of the Amendment to the constitution did not go into effect on August 8, 1870.

This court has always held "That if a contract *when made* was "valid under the constitution and laws of the State, as they had "been previously expounded by its judicial tribunals, AND AS THEY "WERE UNDERSTOOD AT THE TIME, *no subsequent action by the Legis-"lature or the judiciary will be regarded by this court as establishing "its invalidity.* Such a rule is based upon the highest principles "of justice. Parties have a right to contract, and they do con-"tract in view of the law as declared to them when their engage-"ments are formed. Nothing can justify us in holding them to "any other rule."

Olcott v. *The Supervisors*, 16 Wallace, 678.
Havemeyer v. *Iowa City*, 3 Wallace, 294.
Gelpecke v. *The City of Dubuque*, 1 Wallace, 175.
Ohio Life and Trust Co. v. *Debolt*, 16 Howard, 432.
Delmas v. *Insurance Co.* 14 Wallace, 661.

In this case we claim that it is not a construction of law of local application that is involved. In fact it is not a construction of this Article of Amendment to the constitution of Illinois *at all.* The Article is very clear and very positive in all its terms,—it is only a question of *when it went into effect and became operative.*

The case is very analogous, in respect to this part of the case, whether the State court decision is binding upon the Federal courts, to the case of *Olcott* v. *The Supervisors*, 16 Wallace, 678.

There this court say, "that the construction of a railroad by a company incorporated by a State for the purpose of building it, and endowed with State's right of eminent domain, is a thing in which the State, as such, has no interest."

Nor, whether a use is public or private, is not a question of constitutional construction. It is a question of general law. Its solution must be sought, not in decisions of any single State, but in principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us.

The principles involved in this case, we claim, are in no sense local or peculiar to Illinois, but are general, and as such the plaintiff has a constitutional right to have them settled in the Federal courts, irrespective of any decision the State court has rendered; and we especially invite the attention of this court to the case of *Olcott* v. *The Supervisors, supra.* These bonds were issued in aid of a railroad, which this court, in the last case cited, holds to be a *public highway*; and the decision of the question here at issue involves taxation to pay the bonds issued to build that road, and the effect of legislative and constitutional enactments under which the bonds were issued. The State Supreme court has held the same doctrine.

The Chicago, Danville & Vincennes R. R. Co. v. *Smith,*
62 Ill. 268.

Where the question is one of general character, and not arising under local laws, this court does not regard State court decisions binding,—nor where equity principles are involved.

Provident Institution v. *Massachusetts,* 16 Wallace, 628.
12 Howard, 488.

Again, this court held, in *Delmas* v. *Insurance Co.*, 14 Wallace, 661, that "If the decision of the State court is based upon a constitutional or legislative enactment, *passed after the contract was* *made, this court has jurisdiction to inquire whether such legislation does impair the obligations of the contract, and thereby violate the Federal Constitution.* In the prosecution of that inquiry this court must decide for itself whether any valid contract existed when the legislation complained of was had, and in making up its judgment on that question, is not concluded by the decisions of the State court."

In the case at bar we bring ourselves *entirely within this rule of this court.* No one questions but that our contract was made in accordance with all laws in force at the time it was made,—by all decisions of the State and Federal courts then in existence, and that the time the legislation complained of took effect, *as August* 8, 1870, was accepted and acted upon by the executive of the State, and all others, until January, 1874, *about four years* after our contract was made, when the State court first decided that this Article of Amendment went into effect and became operative on the 2d day of July, 1870, instead of August 8, 1870, as had been the time accepted and acted upon by all interested for nearly two years.

Again, "Where a question involved in the construction of State statutes practically affects those remedies of creditors which are protected by the constitution, this court will exercise its own judgment on the meaning of the statutes, irrespective of the decisions of State courts, and if it deems those decisions wrong, will not follow them, and this, whether the case comes here from the circuit court in the ordinary course, or from the Supreme court of the State, under the the 25th section of the Judiciary Act. * * A remedy, which the statutes of a State, on what this court considers a plainly right construction of them, Section 25: "In case this constitution and the articles and sec- "tions submitted separately be adopted, the existing constitution "shall cease in all its provisions."

The result of the vote of July 2, 1870, was ascertained July 27, 1870, within the time fixed by the Constitutional Convention of 1870, and showed that the people had voted for the new constitution and all of the separate Articles of Amendment by a large majority, and Governor John M. Palmer, the man appointed by the convention, in obedience to their order, made the following announcement and proclamation of the results of the election:

PROCLAMATION.

STATE OF ILLINOIS,
DEPARTMENT OF STATE.

JOHN M. PALMER, *Governor of Illinois:*

Pursuant to the provisions of section eleven of the Schedule of the Constitution, adopted by the people of the State of Illinois, on Saturday, the second day of July, A. D. 1870, I, John M. Palmer, Governor of the State of Illinois, do hereby proclaim, that on the twenty-seventh day of July, A. D. 1870, the official abstracts of the votes cast on the said second day of July, A. D. 1870, by the electors of the several counties of the State of Illinois, for and against the adoption of the proposed new Constitution of the State of Illinois, and for and against the adoption of the several articles separately submitted therewith, were duly canvassed by the Secretary of State, Auditor, and Treasurer of State, in my presence, and that the result of said canvass was as follows:

For the New Constitution, there were	134,227 votes
Against the New Constitution	35,443 votes
For the sections relating to railroads in the article entitled "Corporations,"	144,750 votes
Against the sections relating to railroads in the article entitled "Corporations,"	23,525 votes
For the article entitled "Counties,"	136,815 votes
Against the article entitled "Counties,	31,644 votes
For the article entitled "Warehouses,"	143,533 votes
Against the article entitled "Warehouses,"	22,702 votes
For three-fifths vote to remove county seats	127,077 votes
Against three-fifths vote to remove county seats	41,417 votes

For the section relating to the Illinois Central Railroad	147,032 votes
Against the section relating to the Illinois Central Railroad	21,310 votes
For the section relating to minority representation	99,022 votes
Against the section relating to minority representation	70,080 votes
For the section relating to municipal subscriptions to railroads or private corporations	134,114 votes
Against the section relating to municipal subscriptions to railroads or private corporations	34,061 votes
For the section relating to the Canal	142,540 votes
Against the section relating to the Canal	27,017 votes

And it further appearing from said abstracts, that a majority of the votes cast were for the adoption of the proposed Constitution, and for the several articles separately submitted therewith;

Now therefore, I, John M. Palmer, Governor of the State of Illinois, do further proclaim, that on and after the eighth day of August, A. D. 1870, the aforesaid Constitution, and the articles submitted therewith, will become the supreme law of the State of Illinois.

Seal of
State of
Illinois.

In testimony whereof, I have hereunto set my hand, and caused the great seal of State to be affixed.

Done at the city of Springfield, this twenty-seventh day of July, A. D. 1870, and of the Independence of the United States the ninety-fifth. JOHN M. PALMER.

By the Governor:
EDWARD RUMMEL, *Secretary of State.*

UNITED STATES OF AMERICA, }
STATE OF ILLINOIS. } SS.

OFFICE OF SECRETARY.

I, Henry D. Dement, Secretary of State of the State of Illinois, do hereby certify that the foregoing is a true copy of a proclamation issued by the Governor of Illinois, as the same appears upon the records now on file in this office.

[SEAL OF ILLINOIS] In witness whereof, I hereunto set my hand and affix the great seal of State, at the city of Springfield, this 5th day of *December*, A. D. 1881.

HENRY D. DEMENT,
Secretary of State.

Again, on the 24th day of September, the same Governor, as appointed by the new constitution itself, issued a second proclamation apportioning the State into Senatorial districts, in which he speaks *officially* of the new constitution of the State of Illinois, "*as adopted July* 2, 1870, *and in force August* 8, 1870."

In his proclamation of July 27, 1870, the Governor says "*that* " *on and after the 8th day of August, A. D.* 1870, *the aforesaid con-* " *stitution, and the articles submitted therewith, will become the su-* " *preme law of the State of Illinois.*"

We have, then, for the contemporaneous construction of *the time when* the new constitution, with all the sections and separate Articles of Amendment went into effect, the two proclamations of the Governor, the interpretation *at the time* of the executive branch of the State government, and the person appointed by the convention to make the proclamations, that the New Constitution and all the Articles of Amendment became the supreme law of the State of Illinois, on the 8th day of August, 1870; and this was the construction put upon it by all interested, and contracts were made under this construction undisputed by any until 1874, when the State Supreme court announced their decision in *Schall* v. *Bowman case.*

The Supreme court of Illinois have held that in cases of doubtful construction, contemporaneous construction is admissible,—following the rule laid down in Cooley on Constitutional Limitations, p. 65.

Jarrott v. *Jarrott*, 2 Gilm. (Ill.) p 1.
Comstock v. *Cover*, 35 Ill. 470.

We are well aware of the general rule that laws take effect from their passage, where no time is fixed for them to take effect;

but in this case we think the time *was fixed* as plainly and as definitely as it could well have been done.

The convention fixed positively the 8th day of August, 1870, as the day when the constitution itself should be in force and effect. They also say, that of the separate Articles of Amendment relating to the Illinois Central Railroad, Minority Representation, Municipal Subscriptions to Railroads and the Canal, "that if a "majority of votes polled are for either of *the sections* separately "submitted, *then such of said sections as* shall receive such majority "shall be a part of the constitution of this State."

All the language used here and elsewhere in the schedule, new constitution, or proclamations of the Governor, go to show that *these sections* and separate Articles of Amendment were considered a *part of the New Constitution*. "The *sections separately submitted*." Sections of what, if not of the new constitution? "*Articles and sections*" of what, if not of the new constitution? "Then such of "said sections as shall receive such majority shall be a part of "the constitution of this State." Which constitution—that of 1848, or that of 1870—were *these sections* to become a part of? In the event that the new constitution was adopted, (and the convention knew well that it would be) manifestly, *these sections* were to become a part of the constitution of 1870, *if the sections* were also ratified by the people.

If the view of the State Supreme Court be correct, then *the sections*, or Article of Amendment referring to municipal corporations, and forbidding aid to railroad or private corporations, went into effect July 2, 1870, when the people voted thereon, and *immediately became a part of the constitution of* 1848, *and remained a part of that constitution until the 8th day of August*, 1870, *when it, being then a part of the constitution of* 1848, *was with it repealed* *and ceased to exist.* As section 25 of the schedule says: "In "case this constitution and the articles and sections submitted "separately be adopted, *the existing constitution shall cease in all its provisions.*"

This municipal corporation section, if of so much importance as the State Supreme Court give it, and as the convention seem to have considered, *must have a home somewhere*, and a firm attachment to one or the other of these constitutions. If the State court decision is to be accepted, we have the absurd conclusion that that Article having become a part of the constitution of 1848, on July 2, 1870, was repealed and ceased to exist after August 8, 1870, being then a part of the constitution of 1848. But if, as we think, it became a part of the constitution of 1870, on the adoption of that instrument, there is no violence done to the language used, or to the spirit and intention of its framers.

Even if, by any forced construction of the language, it became a part of the constitution of 1848, the same question would arise as to when it became operative, and under the decision of a similar case in New York, they decide *against* the view adopted by the State Supreme Court of Illinois.

Real v. *The People*, 42 N. Y. (3 Hand.)

Is not the act of the Governor who was appointed by the convention, in the event of a majority of the voters favoring the adoption of the new constitution and all the Articles that were separately submitted, to make proclamation of that fact, *the act of the convention itself?* If so, the convention *fixed the time when* this amendment went into effect, and the controversy is ended. The Governor was certainly appointed by the convention to make the two proclamations he made, and no one has yet denied that his duties were properly executed. These proclamations *were a necessary part of the work of the convention*, and without them its work would be incomplete. No one will contend that without these proclamations the constitution of 1870, or any of the separate sections, would have become the supreme law of the State of Illinois, or that any one would have been bound to notice or obey them. If so, was not the announcement by the Governor, that the new constitution and all the separate Articles submitted "will become the supreme law of the State of Illinois, on and after August 8, 1870," an act of the convention itself, and such an act as fixed the time, beyond all doubt, as they intended, when the new constitution and all the sections became operative and in force.

In the construction of statutes of doubtful import, a large interpretation is always allowed, and the intention of the legislature is sought after, and the whole instrument is to be made harmonious in all its parts, and to harmonize with the intention of the parties interested. We think that from the language used there can be no doubt as to the intention of the convention, and the Governor, their appointed agent. And as to the people, the party most interested, there would seem to be less doubt as to their intention and expectation as to when these Articles and this new constitution, on which they voted, should take effect.

It was a matter of great public interest to the people of the State of Illinois, and through the press they had read the text of the new constitution and the schedule, and from them had learned that they would be in force on and after August 8, 1870, if the people ratified them by their vote. The people of Walnut town and the railroad officials certainly so understood the terms of the constitution and the schedule, or the people of that town would not have voted these bonds, nor the railroad company have accepted them had they not supposed these bonds valid. The first proclamation by the Governor, was issued July 27th, 1870, and the vote on these bonds was taken August 6, 1870, eleven days after the proclamation, and two days before the Article prohibiting municipalities from aiding railroad or private corporations would take effect, according to the Governor's proclamation.

The larger interpretation of construction to doubtful statutes has always been the rule of the State Supreme Court of Illinois, until the decision in *Schall* v. *Bowman*.

They say, in 2 Scam. [Ill.] *Mason* v. *Finch*, 223, and reaffirm the same in *Burke* v. *Monroe Co.* 77 Ill. 611: "In construing "statutes, courts look at the language of the whole act, and if "they find in any particular clause and expression not so large "and extensive in its import as those used in other parts of the "statutes, if upon a view of the whole act, they can collect from "the more large and extensive expressions used in other parts, the "real intention of the Legislature, it is their duty to give effect to "the larger expression."

In 3 Scam. [Ill.] *People* v. *Canal Commissioners*, 153, the same court say: "In construing statutes, we should look at the real "object and intention of the law-makers, as gathered from an ex-"amination and comparison of the whole, and its spirit and im-"port. If it is apparent, that by a particular construction of a "statute in a doubtful case great interests would be endangered, "or sacrificed, it ought not to be presumed such construction was "intended by the Legislature. It is not the province of the courts "to decide upon the expediency or the propriety of a statute, but "to ascertain its just, reasonable and true construction."

In *Stribbling* v. *Prettyman*, 57 Ill. 371, the State court say: "In "construction of statutes, the intention of the Legislature is al-

"ways a proper subject of inquiry. The intention to be ascertained from the act itself and *other acts*, in *pari materia*—all acts "in *pari materia* are to be taken together, as if they were one law, "and this rule prevails even though some of the acts may have "expired or been repealed."

"Where a statute needs construction, every part of it must be "considered, so that the whole may harmonize,—it never being "presumed that any portion was intended to be without meaning."

Way v. *Way*, 64 Ill. 406.
Decker et al. v. *Hughes*, 68 Ill. 33.
Gardner v. *The Collector*, 6 Wallace, 499.

"When a constitutional provision is plain and unambiguous, the "fact that it may work great inconvenience or hardship to a particular class of officers or persons, furnishes no ground for the "courts, by construction, to pervert its evident intention."

Chance v. *Co. of Marion*, 64 Ill. 66.

"When the Legislature and executive branches of the government, by the adoption of an act, give a construction to a provision of the constitution, if the construction thus given is only "doubtful, the courts will not hold the act void. *It is only in cases "of its clear* infringement that courts will interpose to hold the act "nugatory." 33 Ill. 9.

"Courts are not justified in giving *a strained construction* or *astute interpretation* to a constitutional provision to avoid the intention of the framers of the instrument, or of a statute passed "under it, to carry out its mandate in order to relieve against individual or local hardships. Their duty is to enforce them according to their plain and obvious meaning."

Law v. *The People ex. rel.*, 87 Ill. 385.

We have quoted thus freely from the text of Illinois decisions to show their attitude on this question of statutory construction, and now refer to the case of *Schall* v. *Bowman*, 62 Ill. 321, and ask the special attention of this court to that decision, as we regard it as directly opposed to all the decisions on such subjects, *both before and since* it was rendered by the Supreme Court of Illinois. In fact it is much fuller of special pleading than Law. It is simply an argument against municipalities incurring debts, in which they *deem great haste as the all-important requisite* for the decision. The reason given for this decision is that haste was required, but delay of even "a single week might have produced "insolvents of these municipalities, greatly swelling the already "enormous aggregate. Delay might be extensive ruin."

Supposing they did become insolvent. They had better become insolvent than repudiate their contracts. It was the duty of this court to have construed the law in the spirit of the decisions of this same court, which were in accord with the law on such subjects, up to this time, and in accord with the intentions of the parties interested, and let the results be what they might.

There was, however, no such danger as this decision would indicate, and it must be remembered that this decision was rendered nearly *four years after* the new constitution had gone into effect, and all the mischief (if indeed there was any) had been done by these wicked and crazy municipalities, that was possible for them to do, nearly four years before.

Then the vote by the people on the constitution itself, as a whole, and on the section forbidding aid to railroads or private corporations, was *very nearly the same*. For the new constitution, 134,227 votes; and for the section forbidding aid to railroads or private corporations, 134,114,—the new constitution receiving only 113 more votes. If there was such great danger that the people would plunge themselves into insolvency, and were so anxious to do so, they would have voted down the section that forbade their indulgence in that coveted luxury. But the vote shows that there was no unhealthy spirit among the people on that subject. The only bad spirit among the people of Illinois on this subject has arisen under this decision and others in the same line, which has aided and strengthened a spirit of repudiation of honest contracts and valid debts incurred.

We are happy to say that it was not a full bench that rendered this decision, and that Justices Scott and Sheldon dissented.

This same State court has rendered a decision, Sept. 27, 1881, *The People ex. rel. Lynch* v. *The Board of Supervisors of La Salle Co., reported in advance sheets of the Ill. Reports, No.* 4, *Vol.* 100, *P.* 495, in which they swing back to their former attitude before the *Schall* v. *Bowman* case, on the question as to the *time when* an amendment to the constitution of 1870 became operative. The question in this case arose as to the election of county officers, under the amendment of 1880 of section 8 of article 10 of the constitution of 1870, *and the principal question was at what time, did that amendment become operative?*

In the essential particulars the same question that is involved in the case at bar is here reviewed and decided by the State Supreme Court of Illinois.

They say, p. 501: "The statute, however, under which this "amendment was, by joint resolution, submitted for adoption, de-"clared expressly that the same, if adopted, 'Shall, by the board "of canvassers, be *declared* adopted, and *from thence* become a part "of the constitution of this State.' (Laws 1877, p. 5)."

Again, (p. 501): "The intention is plainly manifested that the "same should be engrafted into the constitution as a component "and potential part thereof, *at least as soon as it should, by the* "*board of canvassers, be declared adopted,* if not as soon as the polls "were closed on the day of the voting for its adoption."

Again, (on *same page, supra*): *"We think when it was declared* "*adopted,* it became not only a potential, *but an operative part of* "*the constitution.*" Justice Scott, in a separate opinion, says, (p. 508): *"Undoubtedly the amendment becomes a part of the consti-* "*tution when the canvassers declared it was adopted.* That is plainly "expressed in the act submitting it to a vote of the people, and a "different time should not be fixed for it to take effect by judicial "construction."

Section 25 of the schedule says that "In case this constitution "and the articles and sections submitted separately be *adopted,* "the existing constitution (that of 1848) shall cease in all its pro- "visions."

Here the constitutional convention use the very word *adopted* that the State court use in this decision, when they say it was adopted *when so declared by the board of canvassers.*

Here the State Supreme Court take exactly the same ground and rule of construction that we advocate in the case at bar— that is, that the amendment to the constitution, in the case at bar, *took effect and became operative when the board of canvassers of the vote declared it was adopted.* The board of canvassers in the case at bar *did declare* "that on and after the 8th day of August, "A. D. 1870, the aforesaid constitution, and the articles submitted "therewith, will become the supreme law of the State of Illinois."

This case, decided by the State court September 27, 1881, was considered a test case, and very ably argued by some of the best lawyers in the State, and the decision reached brings the court in harmony with its rulings prior to *Schall* v. *Bowman*, and is practically an overruling of that decision. If we are correct in this conclusion, it ought to be conclusive in our case.

There is, however, one other question which we ask this court to consider, and that is the question of *vested rights*. The plaintiff acquired rights under his contract in the purchase of the bonds in question, under the laws as they were interpreted at the time, and long afterwards, that ought not to be disturbed. The Town of Walnut still holds the stock that they received from the railroad company in payment of these bonds; and we know of no law that would impair or destroy such contracts, when passed or judicially construed long after the contracts were made, under what was accepted as the law of the land at the time they were made. At the very least, the plaintiff has the right to have his contract passed upon by the Federal courts of the country.

Section 1 of the schedule to the new constitution of 1870, says: "That all laws in force at the adoption of this constitution, not "inconsistent therewith, and all rights, actions, prosecutions, "claims and contracts of this State, individuals, or body corporate, "shall continue to be valid as if this constitution had not been adopted."

A statute operates *in futuro, only*, and that it will not be construed to affect past transactions.

McHany et al. v. *Trustees of School*, 68 Ill. 140.

"The rule of construction is, that a constitution, unless it is "clearly otherwise expressed in the instrument, *can operate only* "*prospectively,* leaving all past transactions unaffected by its pro-"visions. The present constitution (that of 1870) expressly saves, "preserves and continues all prior rights, etc., as they were be-"fore its adoption."

City of Chicago v. *Rumsey,* 87 Ill. 348.
Fuller v. *Heath,* 89 Ill. 269.

The plaintiff has all the equities in this case in his favor, and we think, the law.

The Town of Walnut issued its bonds under the laws as then construed, and with ample power to do so. The plaintiff's money was paid therefor at almost their face value. They received the railroad as they expected, the plaintiff's money being used to aid in its building. They have the railroad, and also the $40,000 of stock of the road, issued for the bonds by the road. They have paid the interest on the bonds for some three years, and would have paid interest and principal had it not been for the decision of the State court in *Schall* v. *Bowman* case. Nothing but a strict adherance to that decision can defeat these bonds. The plaintiff is an innocent purchaser for value. He had no notice whatever of any defect in the law, and could have none. He had a right to suppose, as he examined the statutes of Illinois, that the new constitution and the Articles of Amendment went into effect August 8, 1870, for it was so published in the statutes at the time, and is so to-day. He had a right to rely upon the statements of the highest officer of the State—the Governor—who had twice officially proclaimed that fact. His bonds were registered by the Auditor of State, and were all covered with evidences of good faith and authority to issue them, and under these circumstances he is entitled to all the protection that a *bona fide* purchaser can have in the highest court in the land.

Under the decision of the State Supreme Court, of September 27, 1881, we claim that the law, even as now interpreted by that court, is with the plaintiff, and we ask that the bonds be declared valid.

GEORGE A. SANDERS,
Attorney for Plaintiff in Error.

FILED

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

J. H. WADE,
Plaintiff in Error,
vs.
THE TOWN OF WALNUT,
Defendant in Error.

No. 239.

Brief for Defendant in Error.

W. C. Goudy
ALLAN C. STORY,
Attorney for Defendant in Error.

CHICAGO, ILL.:
S. I. BRADBURY & SONS, LEGAL PRINTERS, 78 FIFTH AVE.
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STATEMENT.

Under the attractive title of "facts" counsel for plaintiff has drawn so largely upon his imagination and so little upon the record in the case, that a statement from us of what is really before the court seems necessary.

On April 4th, 1879, suit was brought by plaintiff against defendant in error in the Circuit Court of United States, Northern District of Illinois, the declaration filed containing one count to which a demurrer was filed by defendant, and after argument was sustained by the Court June 10th, 1879. The declaration shows that on January 1st, 1871, the defendant executed and delivered 519 instruments in writing, the numbers of which are stated payable to the bearer on January 1st, 1874, in the city of New York; also 100, numbered 301 to 400, inclusive, January 1st, 1875, and a similar number in each of the years 1876, 1877, 1878 and 1879. That all were signed by Knight as supervisor, and Landers as town clerk, and are *fac similes* of each other, except numbers and dates, and are for $10.00 each. That they represented the interest due in each of said years respectively, on bonds of the town bearing corresponding numbers with said coupons for the sum of $10.00 each, made and delivered by the same officers and payable to the Illinois Grand Trunk Railway, or bearer, January 1st, 1881, at said treasurer's offices, Springfield, Ill., with interest from January 1st, 1871, at ten per cent. per annum, payable annually on surrender of said coupons. That said bonds were numbered 301 to 400 inclusive, and the installments of interest maturing before the instruments sued on were paid by defendant. That said bonds were *fac similes*, except as to the numbers, and recited on their face that they were "issued under and by virtue of the charter of the Illinois Grand Trunk Railway and amendments thereto and other laws of the State of Illinois, and in accordance with a vote of the electors of the town of Walnut and State of Illinois, at a special election held August 6th, 1870, in accordance with said charter and amendments and laws." That said bonds were issued under the style of Township of Walnut in the County of Bureau and State of Illinois; that plaintiff became purchaser and owner of each and every of said bonds and each and every of said coupons, on the 27th day of September, 1871, before they became due, for a valuable consideration, viz: 97 cents on the dollar for all of *said bonds and coupons maturing on the 1st of January, 1872*, and in good faith without any notice of defense to said bonds. That each of said coupons were alike and *fac similes*, except as to numbers and dates of maturing, and of the same tenor and effect. (A copy is set forth Rec. p. 3). That each and every of said bonds, from which said coupons were detached by plaintiff were, and are alike, except as to numbers, and of the same tenor and effect (setting forth a copy, pp. 3, 4), and contains among others the following recital: "This bond is issued under and by virtue of the charter of said Illinois Grand Trunk Railway Company, and amendments thereto, and other laws of the State of Illinois, and in accordance with the vote of the electors of said township at the special election held *August 6th, 1870*, in accordance with said charter and amendments and laws." That each of said bonds bears the endorsement, "The Illinois Grand Trunk Railway, by A. H. Cassell, President," and also a certificate of register of the auditor of public accounts of the State of Illinois, dated April 15th, 1871 (set forth in full, Rec. p. 4): "That by means of the premises on January 6th, 1879, defendant became liable to pay the said sum of money in said 519 interest notes, specified and promised to pay on request, etc., but has refused to do so, etc. *Ad damnum*, $10,000 00."

POINTS.

I.

The bonds from which the coupons sued on were cut, are void on their face under the separate section of the constitution of Illinois of July 2d, 1870, entitled, "Municipal Subscriptions," etc. When this went into operation, is a question of constitutional construction only, which belongs *exclusively* to the Supreme Court of that State.

Having been repeatedly decided adverse to plaintiff's contention, it is *res judicata* and decisive of this case.

Rev. Stat., U. S., Sec. 721.
Dwarrison Stat., by Potter, p. 194 (note 15), 368.
Cooley's Constl. Lim., * 13, and many cases cited, note 3.
Judiciary Act, 1789, parag. 34.
Const. Ills., 1870, Sec. 4, Art. XIV.
Vol. 2, Proceedings Ills., Constl. Conv., p. 1878, 1879.
Schall v. *Bowman*, 62 Ills. 322.
Richards v. *Donagho*, 66 Ills. 73.
Wright v. *Bishop*, 88 Ills. 304.
Concord v. *Savings Bk.*, 92 U. S. 539.
Moultrie v. *Savings Bk.*, 92 U. S. 636.
Hunt, J., in Randolph Co., v. *Post*, 93 U. S. 508.
Fairfield v. *Gallatin Co.*, 100 U. S. 51.
Walnut v. *Wade*, 103 U. S. 687.
Town of Louisville v. *Portsmouth Savs. Bk.* Mans. Opn. Oct. T., 1881.

II.

This court, upon questions of the construction of a state constitution or statute, will always follow the construction given by the court of last resort in that State, unless the same has been varied or questioned by conflicting decisions of the same State court (of which, in Illinois, there are none).

Provident Institution v. *Mass.*, 6 Wall. 630.
Randall v. *Brigham*, 7 Wall. 541.
Gut v. *State*, 9 Wall. 37.
R. R. Co. v. *McClure*, 10 Wall. 515.

Secomb v. *R. R. Co.*, 23 Wall. 117.
Fairfield Co. v. *Gallatin*, 100 U. S. 51.
Randolph v. *Post*, 93 U. S. 508.
Concord v. *Savings Bk.*, 92 U. S. 539.
Moultrie v. *Savings Bk.*, 92 U. S. 636.
Walnut v. *Wade*, 103 U. S. 687.
Louisville v. *Savings Bank, supra.*

III.

The constitutional inhibition of July 2d, 1870, cannot be evaded or nullified by *estoppel*. A levy and collection by taxation and payment of interest upon purported obligations of a *quasi* municipal corporation, cannot validate transactions shown upon their face to have been void, because *malum prohibitum*.

Marsh v. *Fulton Co.*, 10 Wall. 676.
Loan Association v. *Topeka*, 20 Wall. 656.
East Oakland v. *Skinner*, 4 Otto 255.
Schoefer v. *Bonham*, 95 Ills., 381.
Schuyler v. *Farwell*, 25 Ills. 81.
Marshall Co. v. *Cook*, 38 Ills. 48.
Lippincott v. *Pana*, 92 Ills. 24.

IV.

The bonds were not endorsed by the treasurer of the company, payee, so as to pass the legal title under the statute of Illinois where issued, and the coupons sued on being attached to and delivered with the bonds (printed Rec., p. 3), are subject to the same infirmity.

"Any such note, bill, or other instrument of writing, made payable to any person or persons, shall be assignable by endorsement thereon under the hand of such person, and of his, her or their assignee or assignees in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

Gross Stat. Ill., 1869, 1870, Tit. "Negotiable Insts.," Chap. 73, Sec. 4.
Ryan v. *May*, 14 Ill. 49.
Chickering v. *Raymond*, 15 Ill. 362.
New Hope & Delaware Bridge Company v. *Perry*, 11 Ill. 467.

V.

A non-suit cannot be pleaded in bar or become *res judicata*.

Lombard v. *Cheever*, 3 Gilm. 469.
Brown v. *Malledy*, 19 Ills. 290.
Yeates v. *Briggs*, 95 Ill. 79.
Newman v. *Dick*, 23 Ills. 338.

And any judgment to have such effect, *must be pleaded or proved* in the latter action, as well as the identity of the parties and cause of action.

Gray v. *Gillilan*, 15 Ills. 453.
Sheldon v. *Patterson*, 55 Ills. 507.
Cole v. *Favorite*, 69 Ills. 457.
Cromwell v. *Sac Co.*, 94 U. S. 352.
Norton v. *Huxley*, 13 Gray 290.

VI.

Plaintiff in error is not a *bona fide* holder for value (printed Rec., p. 3).

Anthony v. *Jasper Co.*, 101 U. S. 693.
McClure v. *Oxford Town*, 94 U. S. 432.
Cromwell v. *Sac Co.*, 96 U. S. 51.
Elmwood v. *Marcy*, 92 U. S. 292.

ARGUMENT.

In this case we have merely to consider whether the declaration states a cause of action.

In the first three pages of their brief, counsel informs the Court and state as facts, "that the bonds were issued in payment of an equal amount in par value of the stock of said railway, which the town subscribed for and which was delivered at the time, and which it has continued to hold, and still holds, claiming property interest in it, and that the entire issue was $40,000.00, all executed and delivered at the same time;" also, "that the consideration was a certificate of stock in said company for $40,000.00, which was delivered to the town, and which it holds," not one word of which appears anywhere in the record. It is an elementary principle without exception, that a demurrer to a declaration merely admits such facts as are properly pleaded, and that such a pleading is to be taken most strongly against the pleader. This is merely an attempt upon demurrer to the declaration to help out the pleading, by statements of outside matters in the arguments of counsel.

I.

At the outset we are met with the proposition (brief, p. 4) that this court has already held the instruments sued on to be valid against the town, and reference is made to *Walnut* v. *Wade*, 13 Otto 983. On the second page of the opinion in that case appears the following: "Before final judgment in the court below, the defendant in error had a *non-suit* as to the coupons sued on bearing numbers from 301 to 400 inclusive, and withdrew the same from consideration by the court, and left, *as the cause of action, only those coupons which bear numbers under 301.*"

This is, doubtless, the first instance of a voluntary nonsuit being cited as *res judicata.* The point does not deserve serious consideration. Besides, the judgment should be pleaded in the suit, and the identity of the parties and cause of action made to appear by proper averments to avail the plaintiff.

Gray v. *Gillilan*, 15 Ills. 453.
Stone v *Wood*, 16 Ills. 177.
Gaddis v. *Seeson*, 55 Ills. 522.
Sheldon v. *Patterson*, 55 Ills. 507.
Cole v. *Favorite*, 69 Ills. 457.
Cromwell v. *Sac Co.*, 94 U. S. 352.
Norton v. *Huxley*, 13 Gray 290.

II.

The constitution of Illinois adopted July 2nd, 1870, contains this provision as a separate section:

"No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation; *provided however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption."

It is conceded that the only authority for issuing the bonds and coupons in question was a vote of the Town of Walnut, taken August 6th, 1870, *thirty-five days* after this provision took *effect. This appears by a recital in the bands.* Unless, therefore, counsel can overturn an unbroken line of decisions by the Supreme Court of Illinois, as well as of this court extending over a period of upwards of eleven years, he has no hope of recovery.

Your honors are asked by counsel in this case to disregard not only the Federal Constitution and act of Congress, but also the several decisions of the Supreme Court of Illinois, construing the constitution as to the time it took effect, as well as the various subsequent decisions of this Court recognizing such construction as correct, and to hold now that such provision did *not* take effect until August 8th, 1870.

Sec. 721 Revised Statutes U. S. (Sec. 34 Judiciary Act) reads as follows:

"The *law of the several States* except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as *rules of decision* in trials at common law in the courts of the United States in cases where they apply." 1 U. S. Stat. 92.

It is not pretended that any treaty, statute, or even the constitution of the United States, has any bearing upon the subject.

The decision of the question when this provision of the constitution of Illinois took effect, therefore properly belongs to the Supreme Court of the State of Illinois, and having been determined by it is conclusive upon this court.

In *Randall* v. *Brigham*, (7 Wall. 541.) Field, J., says: "A construction of this constitution by the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon us." Citing *Provident Institution* v. *Massachusetts*, (6 Wall. 630.)

And the same principle has been recognized in—

Gut v. *State*, 9 Wall. 37.

Secomb v. *Railroad Co.*, 23 Wall. 117.

Railroad Company v. *McClure*, (10 Wall. 515) was a case where *after* certain bonds had been issued (which it is claimed by counsel is an important feature of the case at bar), the Supreme Court of Iowa, decided that bonds were unauthorized by the constitution of the State, of Iowa. In a writ of error from this court Swayne, J., in the opinion dismissing the writ of error says: "The constitution of the State which is construed by the Supreme Court of the State as working the result complained of, *was in force* when the bonds were issued. Under these circumstances, we have not deemed it proper to extend, our examination of the case beyond this point."

See also Cooley's Constitutional Lim. * p. 13 and many cases cited note 3.

In the recent case of *Fairfield* v. *County of Gallatin*, (100 U. S. 52.) Mr. Justice Strong, uses the following language: "At a very early day it was announced that in cases depending upon the constitution or statutes of a State, this court would *adopt the construction* of the statutes or constitution given by the courts of the State when that construction could be ascertained. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87. In *Nesmith* v. *Sheldon*, 7 How. 812, it is declared to be the "established doctrine that this court will adopt and follow the decisions of the State courts in the construction of their own constitution and statutes, when that construction has been settled by the decisions of its highest tribunal." In *Walker* v. *State Harbor Commissioners*, 17 Wall. 648, we said: "This court follows the adjudication of the highest court of the State" in the construction of its statutes. "Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness." See also *Elm-*

endorf v. *Taylor*, 10 Wheat. 152; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Leffingwell* v. *Warren*, 2 Black. 599; *Sumner* v. *Hicks*, *id.* 532; *Olcott* v. *The Supervisors*, 16 Wall. 678; *State Railroad Tax Cases*, 92 U. S. 575.

Such has been our general rule of decision. Undoubtedly some exceptions to it have been recognized. One of them is that when the highest court of a State has given different construction to its constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that and disregarded the latter. *The present case is not within that exception for there have been no conflicting interpretations by the State court*, of the section of the constitution we are now called upon to construe. And we are not constrained to refuse following the decision of the State court, in order to save rights acquired on the faith of our ruling in *Town of Concord* v. *Portsmouth Savings Bank* * * when that interpretation within the State fixed a rule of property, and has never been abandoned. * * We think it our duty to follow the State courts, and adopt as the true construction *that which those courts have declared.*"

It is difficult to see, even upon the statement of counsel, how any construction by the Supreme Court of Illinois, of any State statute prior to that time, can throw any light whatsoever upon the date when the constitution of July 2, 1870, took effect, and counsel in argument start at once into the consideration of the question as new, and still an open one, but fail to cite a single case in the Supreme Court of Illinois, having any bearing upon the subject. Nor is it true that the Illinois decisions were made years after the bonds were purchased by plaintiff. The declaration alleges the purchase to have been make September 27th, 1871. *Schall* v. *Bowman*, was heard at the September term 1871, (which convened September 5, 1871,) and was decided early in January, 1872. This is the first reported case on the subject. The late Mr. Justice Breese delivered the opinion which we quote as follows; (p. 322.)

"There are three questions presented on this record for our consideration.

1st. Did the section of the new constitution (submitted separately) in relation to municipal subscriptions to railroads or private corporations, take effect before the third day of August, 1870, and thereby annul the right of the city of East St. Louis to vote the subscription? * * * We have confined our attention to the first question as an affirmative answer to that settles the controversy.

We have examined the constitution with care, aided by the able arguments of counsel, and can come to no other conclusion than this: That the separate articles of the constitution of 1870, by the vote of the people taken on the second day of July of that year, became a part of the organic law of the State from and after that day, and a constituent part of the same *eo instanti*."

After reviewing and commenting upon sections 8, 10, 11, and 12 of the schedule, the Court proceeds:

"The election was held on the second day of July, 1870; the returns were made within twenty days thereafter, in pursuance of section 11, and on the 26th of that month the official canvass was made, and on the 27th the governor issued his proclamation declaring the result.

The election in the city of East St. Louis authorizing the subscription in question, took place on the 3rd day of August, 1870.

Collating the provisions of the constitution bearing on this question, as we have done, it seems difficult to reach any other conclusion than this, that whatever might be the fate of the new constitution as a whole, the separate articles voted, in receiving a majority of the votes cast, became *ipso facto* and *eo instanti* a part of the organic law of the State. To this conclusion the mind must be led in considering the language used in connection with the object to be attained, and this involves a consideration of the evils of the old system, to remedy which a weighty obligation rested upon the convention.

The provision in question was so framed that it could appropriately and effectually, become a part of the organic law, without the disturbance of any of its elements, and was a declaration of the people on the 2nd day of July, 1870, that from and after that day no matter what may become of the new constitution, no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to, or loan its credit in aid of such corporation.

The passion for subscriptions by the municipalities to every conceivable project presenting itself in a corporate form was so violent and prevailed so extensively throughout our State, as to demand a speedy, prompt and efficient remedy.

Under the Constitution of 1848 these subscriptions were authorized for corporate purposes, and the taxing power was legally exercised to meet their exigencies. To such an extent had it progressed prior to July 2d, 1870, that counties, towns and cities in this State had become involved to the extent of millions of dollars, for which the property and labor of their people were for-ever pledged. Article 9, section 5, Constitution of 1848.

We are unable to find anything in the Constitution itself, or in the schedule thereto, militating against the view we have taken, that this separate article of the Constitution of 1870 went into full effect on the day of its adoption by a vote of the people; that is on the 2nd day of July, 1870. There is no provision of the Constitution requiring a different construction.

Counsel for appellee asks, was there any pressing necessity that this section should go into effect thirty-six days before the Constitution itself? We answer the condition of these municipalities to which we have adverted, and the increasing demand for railroads, many of those enterprises thrust upon the attention of the people so clamorously, admonished the convention they could not be too prompt in arresting the tide. A delay of a single week might have produced insolvency of these municipalities greatly swelling the already enormous aggregate. Delay might be more extensive ruin.

The counsel further says that taxation under our form of government is indirectly sanctioned by the people, as they, in a representative capacity, make the assessments and levy the taxes. But this is almost in fact a case of voluntary donation by the people of their own funds to an enterprise believed by them to be necessary to their municipal welfare. They ask to be permitted to dispose of their own property as to them seems fit; and courts will not, he trusts, at the instance of a factious few, representing little property and less enterprise, deny them this right unless it is clear that the law under which they act is unconstitutional.

This was the argument which prevailed under the Constitution of 1848, yielding to which has caused our vast municipal debt.

Many of those who vote these subscriptions, it was well known to the convention and to everybody else, did not possess a dollar of their own, or own any property to be taxed, but having the voting power, they could so use it in furthering such enterprises, producing as they do many jobs and contracts by which they would profit as individuals, with none of the burdens of a taxpayer.

It is no great effort of liberality, or exhibition of public spirit, for a penniless man to vote money out of the pockets of his neighbor. Such having no property of their own to be taxed, have been found willing and eager to depredate, in the shape of taxation, upon the hard-earned gains of others, especially if he himself is to be a participant in the spoils. It was in the condemnation of such a system the convention so promptly interfered."

This case was followed by *Richards* v. *Donagho*, 66 Ill. 73, in September, 1872, which involved the validity of an election held August 2d, 1870, in which *Schall* v. *Bowman* was expressly approved, Mr. Justice Thornton delivering the opinion.

Note.—This case is cited with approval by Mr. Justice Hunt in *Randolph* v. *Fost*, 93 U. S. 508.

The decision in both of these cases that the Constitution took effect July 2d, 1870, was recognized in *Jackson County* v. *Brush*, 77 Ill. 59, and *Middleport* v. *Ætna Life Ins. Co.* 82 Ill. 562.

In *Wright* v. *Bishop*, 88 Ill. 304, the election was held August 2d, 1870. Scholfield, J., in affirming a decree perpetually enjoining the issue of bonds thus voted uses the following language: "The clause in the Constitution containing the prohibition against municipal subscriptions or donations in aid of railroad companies, etc., took effect on the 2d day of July, 1870, and all such subscriptions or donations not authorized by a vote of the municipality prior to that time are void." *Schall* v. *Bowman*, 62 Ill. 321; *Richard* v. *Douagho*, 66 id. 73. "Appellants make a very able and interesting argument against the ruling in those cases, but we are not convinced that they should be overruled."

It is to be observed that though two of the seven judges composing the court dissented in *Schall* v. *Bowman*, yet in *Wright* v. *Bishop* the *opinion was unanimous.*

All these cases are reviewed and cited with approval by this court in *Town of Louisville* v. *Portsmouth Savings Bank*, opinion by Harlan, J., decided at the present term.

In the following cases this Court has also acquiesced in, and approved without question the decision of the Illinois Supreme Court that this section took effect July 2d, 1880:

Concord v. *Savings Bank*, 92 U. S. 539.
Same v. *Same*, Id. 630.
Moultrie v. *Savings Bank*, 92 U. S. 636.
County of Randolph v. *Post*, 93 U. S. 508.
Fairfield v. *Gallatin Co.*, 100 U. S. 51.
Walnut v. *Wade*, 103 U. S. 687.

The case, therefore, is clearly within and controlled by the maxim *stare decisis non quieta movere.*

Chancellor Kent in speaking of the doctrine of *stare decisis*, says:

" It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy, and trust, and deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared it ought not to be disturbed."

1 Kent, 475.

"And even if the same or any other court in a subsequent case should be in doubt concerning the correctness of a decision, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be entered upon."

Cooley Constl. Lim. 450.

"It is an established rule to abide by former precedents *stare decisis* where the same points come again in litigation; as well to keep the scale of justice even and steady and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from, according to his private sentiments. He being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one *just decire et non just dare.*"

Broom's Legal Maxims, p. 109.
1st Black Com. 69.

"It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of the law as a science." Parke, J., in *Meyerhouse* v. *Rennells*, 1st Clark and Finl. 546.

"Accordingly where a rule has become settled law, it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanted, or although the principle and the policy of the rule may be questioned."

Broom's Legal Maxims, 111.

Ram's Science of Legal Judgt., 33, 35 and cases cited.

Counsel for plaintiff appreciating these difficulties use this language (Brief, p. 7 and 8): "This court has deemed it proper to differ in judgment from the Supreme Court of Illinois, especially upon questions growing out of the issuing of railroad aid bonds."

We hardly think an insinuation implying that the principles controlling the construction of State statutes and constitutions are any different in this court when applied to railroad aid bonds than to other classes of cases brought before it for decision, can operate to aid the plaintiff's case.

III.

But even if we treat it as an original proposition and cognizable by this court, plaintiff's position is not improved, but the wisdom and correctness of the decisions of the Illinois Court is made more manifest.

Under the common law canons of construction a statute is to operate from *the very day it passes*, if the law itself does not appoint a different time.

Potter's Dwarris on Stat. pp. 169 and 170.
1 Kent's Com. 455–6.
Rex v. *Bailey*, R. & R. C. C. 1.
Same case I. Russ, C. & M. 109.
Lattess v. *Holmes*, 4 T. R. 486.
Bacons Maxims 39, 40.
Att'y. Genl. v. *Panter* 6 Bro. P. C. 553.

So in the United States—

Mathews v. *Lane*, 7 Wheaton 146.
The Ann. 1 Gallison, 62.

The essential question is to ascertain the intention of the legislators primarily from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, the defect in the former law, and the designed remedy, being the causes which moved the Legislature to enact it.

Potter's Dwarris pp. 184, 188.
1 Kent's Com. 468.

If there be a material alteration in the language used in the different clauses of a statute, it is to be inferred that the Legislators knew how to use terms applicable to the subject matter.

Potter's Dwarris 198.

So when they are found sometimes inserting and sometimes omitting, a clause of relation, it is to be presumed that their attention has been drawn to the point, and that the omission is designed. Id.

Moses v *Newman*, 6 Bing. 561.

In ascertaining the causes which moved the convention to enact this section, we can give no more accurate description, of them, than the clear and comprehensive opinion of Judge Breese. (Ante p—.)

In examining the language used, we find from the schedule (Sec. 12) that the convention submitted ten propositions. The new constitution entire, and nine other separate articles, either of which might be either adopted or rejected. The language used is specific and carefully guarded:

"If it shall appear that a majority of the votes polled are for the new constitution, then so much of this constitution as *was not separately submitted* to be voted on by articles and sections, *shall be the supreme law* of the State, on and after Monday the 8th day of August,

A. D. 1870, but if * * a majority of votes were against the new constitution, then so much thereof as was not separately submitted shall be null, etc."

This is a solemn legislative affirmation that the new constitution proper *only* should take effect on that day.

Morgan v. *Thornhill*, 11, Wall. 65.
Insurance Co. v. *Comstock*, 14 Wall. 263.

"If *it shall appear* that a majority * * are for the section relating to railroads, in the articles (of the new constitution) entitled "corporations," section in said article shall be a part of the constitution of this State."

The language of section 12 as to each of the other separate sections is: "If a majority of the votes *are* for either of the sections * relating * to municipal subscriptions etc., then *such of said sections as shall receive such majority shall be a part of the constitution.*"

It seems manifest from this language, that an immediate taking effect of such of the separate articles as were adopted, was contemplated aside from the common law canon cited supra.

Only three dates are possible viz: The date of voting July 2d; the date of the canvass July 26, and the date expressly named for the entire new constitution August 8, 1870.

The last must be excluded, not only by the language of the convention, but also under the canons cited supra, and the familiar maxim *inclusio unius est exclusio alterius*.

There remain then only the date of voting, and the date of canvassing, *both of these are prior to the date recited in the bonds*, and it is therefore immaterial to plaintiff which is the true date.

The language is: "If a majority of the votes *are* for either," etc., then such of said sections as shall receive such majority shall be a part &c.

When was the majority for the section under consideration? Manifestly on July 2, 1870. No vote was or could be cast after that day.

When did it *receive* such majority? Manifestly on July 2nd, 1870.

When was it then under this command of the convention, that "such section shall be a part of the constitution?" Manifestly on the day "the majority *was* for the article," July 2nd, 1870.

Counsel attempts to show a confusion in the immediate taking effect of the article as to minority representation, (brief p. 13) but an exception is made in section 12, where it is expressly declared that unless the new constitution proper was adopted, the minority section should *not* take effect though separately carried.

This exception proves the rule contended for by us.

Note the schedule as given by counsel and as printed in Gross' Statutes, is inaccurate, as will appear by reference to Vol. 2 Proceedings Illinois Constl. Convention pp. 1878 and 1879, which is the only official copy, some of the more important parts of which we quote *in extenso*.

SCHEDULE.

That no inconvenience may arise from the alterations and amendments made in the constitution of this State, and to carry the same into complete effect it is hereby ordained and delivered.

SEC. 7. On the day this constitution is submitted to the people for ratification, an election shail be held for judges of the Supreme Court, * * * and the election be otherwise conducted, returns made, and certificates issued, in accordance with existing laws, except that no registry shall be required at said election. * * If upon canvassing the votes for and against the adoption of this constitution it shall appear that there has been polled a greater number of votes against than for it, then no certificates of election shall be issued for any of said Supreme or Circuit judges.

SEC. 8. This constitution shall be submitted to the people of the State of Illinois for adoption or rejection, at an election to be held on the first Saturday in July, in the year of our Lord, one thousand, eight hundred and seventy, and there shall be separately submitted at the same time for adoption or rejection. * * * * Every person entitled to vote under the provisions of this constitution, as defined in the article in relation to "suffrage," shall be entitled to vote for the adoption or rejection of this constitution, and for or against the articles, sections, and questions aforesaid, separately submitted. * * * *

SEC. 10. At the said election the ballots shall be in the following form:

NEW CONSTITUTION TICKET.

For all the propositions on this ticket which are not cancelled with ink or pencil; and against all propositions which are so cancelled.

For the new constitution.

For the sections relating to railroads in the article entitled corportions.

For the article entitled counties.

For the article entitled warehouses.

For a three-fifths vote to remove county seats.

For the section relating to the Illinois Central Railroad tax.

For the section relating to minority representation.

For the section relating to municipal subscriptions to railroads or private corporations.

For the section relating to the canal.

Each of said tickets shall be counted as a vote cast for each proposition thereon not canceled with ink or pencil, and against each proposition so canceled, and returns thereof shall be made accordingly by the judges of election.

SEC. 11. The returns of the whole vote cast and of the votes for the adoption or rejection of this constitution and for or against the articles and sections respectively submitted, shall be made by the several county clerks as is now provided by law, to the Secretary of State within twenty days after the election, and the returns of the said votes shall, within five days thereafter, be examined and canvassed by the auditor, tresurer, and Secretary of State, or any two of them, in the presence of the Governor, and proclamation shall be made by the Governor forthwith *of the canvass*.

SEC. 12. If it shall appear that a majority of the votes polled *are* for the new constitution, then so much of this constitution as was not separately submitted to be voted on by articles and sections, shall be the supreme law of the State of Illinois, on and after Monday, the eighth day of August, in the year of our Lord, one thousand, eight hundred and seventy; but if it shall appear that a majority of the votes polled were against the new constitution, *then* so much thereof as was not separately submitted to be voted on by articles and sections, shall be null and void. If it shall appear that a majority of the votes polled are for the sections relating to railroads in the article entitled "corporatious," sections nine, ten, eleven, twelve, thirteen, fourteen, and and fifteen, relating to railroads in said article, shall be cates issued, in accordance with existing laws, except that no registry shall be required at said election. * * If upon canvassing the votes for and against the adoption of this constitution it shall appear that there has been polled a greater number of votes against than for it, then no certificates of election shall be issued for any of said Supreme or Circuit judges.

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Each of said tickets shall be counted as a vote cast for each proposition thereon not canceled with ink or pencil, and against each proposition so canceled, and returns thereof shall be made accordingly by the judges of election.

SEC. 11. The returns of the whole vote cast and of the votes for the adoption or rejection of this constitution and for or against the articles and sections respectively submitted, shall be made by the several county clerks as is now provided by law, to the Secretary of State within twenty days after the election, and the returns of the said votes shall, within five days thereafter, be examined and canvassed by the auditor, tresurer, and Secretary of State, or any two of them, in the presence of the Governor, and proclamation shall be made by the Governor forthwith *of the canvass.*

SEC. 12. If it shall appear that a majority of the votes polled *are* for the new constitution, then so much of this constitution as was not separately submitted to be voted on by articles and sections, shall be the supreme law of the State of Illinois, on and after Monday, the eighth day of August, in the year of our Lord, one thousand, eight hundred and seventy; but if it shall appear that a majority of the votes polled were against the new constitution, *then* so much thereof as was not separately submitted to be voted on by articles and sections, shall be null and void. If it shall appear that a majority of the votes polled are for the sections relating to railroads in the article entitled "corporatious," sections nine, ten, eleven, twelve, thirteen, fourteen, and and fifteen, relating to railroads in said article, shall be a part of the constitution of this State; but if a majority of said votes *are* against such sections, they shall be null and void. If a majority of the votes polled *are* for the articles entitled "counties," such article shall be a part of the constitution of this State, and shall be substituted for article seven in the present constitution, entitled counties; but if a majority of said votes *are* against such article, the same shall be null and void. If a majority of the votes polled are for the artitle entitled "warehouses," such article shall be a part of the constition of this State; but if a majority of the votes are against such article, the same shall be null and void. If a majority of the votes polled *are for either* of the sections separately submitted relating respectively to the Illinois Central Railroad, minority representation, municipal subscriptions to railroad or private corporations, and the canal, then such of said sections *as shall receive such majority, shall be* a part of the constitution of this State; but each of said sections so separately submitted, against which respectively there shall be a majority of the votes polled, shall be null and void; provided that the sections relating to minority representation shall not be declared adopted unless the portion of the constitution not separately submitted to be voted on by articles and sections, shall be adopted; and in case said section relating to minority representation shall become a portion of the constitution, it shall be substituted for sections seven and eight of the legislative article. If a majority of the votes cast at such election shall be for a three-fifths vote to remove a county seat, then the words "a majority" shall be stricken out of section four of the article on counties, and the words "three-fifths" shall be inserted in lieu thereof, and the following words shall be added to said section, to-wit:

"But when an attempt is made to remove a county seat to a point nearer to the center of a county, then a majority vote only shall be necessary." If the foregoing proposition shall not receive a majority of the votes as aforesaid, then the same shall have no effect whatever.

SEC. 25. In case this constitution and the articles and sections separately submitted, be adopted, the existing constitution shall cease in all its provisions; and in case this constitution be adopted, and any one or more of the articles or sections separately submitted be defeated, the provisions of the existing constitutian, if any, on the same subject, shall remain in force.

SEC. 26. The provisions of this constitution required to be executed prior to the adoption or rejection thereof, shall take effect and be in force immediately."

Proc. Ill. Const. Conv'n, Vol. 2, last pages.

But it is said by counsel that cotemporaneous construction has fixed a different date, and he quotes the Governor's proclamation.

It is an error to suppose that Gov. Palmer in his proclamation cotemporaneously construed the Constitution as is now attempted by counsel. He merely says: "On and after August 8th, 1870, the *aforesaid Constitution and the articles* submitted therewith will become the supreme law," etc. This was strictly true, as under no circumstances could *all* these changes in the fundamental law become operative until that date, which had been fixed by the convention itself. Besides his proclamation was in terms only authorized by the convention to show or announce the *result of the vote* or "canvass." He was not authorized to fix the date when the Constitution or articles were to take effect. This had been fixed by the convention, which alone had authority, and ratified by the vote of the people.

The Supreme Court of Illinois had this proclamation before it, and have construed the schedule to mean July 2 as the date of this provision taking effect. This is conclusive on every other department of the State, and by the act of Congress quoted binding also on this court.

If, however, we resort also to cotemporaneous construction, we find that Hon. *J. Medill*, a member of the convention while this subject was under discussion in that body, used the following language: "If it (this separate article) receives the sanction of a majority of the electors, it becomes a part of the constitution, whether the old or the new one."

Vol. 2, Proceedings Ill. Const. Con. p. 1239.

And *Mr. Washburne*, another member, says: "* They (the convention) say * if this Constitution is rejected, then this section shall become a part of the old Constitution, because they do not intend, I apprehend, when they propose to submit it separately *that it shall abide the fate of the new Constitution at all.* But * * in the event of that being rejected, that the section shall go into the old Constitution. *"

Id. p. 1857.

The date of "rejection" or "adoption" of either was and could only be, the date of the election, July 2, 1870. We are thus again led to determine the date as July 2, as held by the court in *Schall* v. *Bowman.*

But it is urged by counsel that the convention in submitting a constitution and separate propositions at the same time borrowed legislation from New York and Iowa, and therefore adopted such judicial construction as those States had given to it.

Aside from the fact that the Illinois Supreme Court has rejected this theory, this position is unsound for two reasons:

1. No part of our Constitution was in fact borrowed from either of those States, and counsel fails to point out even a *similarity*.

2. In *McCutcheon* v. *People*, 69 Ill., cited by counsel, although the legislation was in fact taken from Ohio, the Supreme Court of Illinois refused to hold that the legislature had, with the language, adopted the construction given to the statute by the Ohio Supreme Court, "because such construction *was inconsistent with the spirit and policy* of our laws." (pp. 604–5.)

In the cases cited from Iowa and New York no such questions arose, hence they need not be reviewed here.

IV.

The bonds were never properly endorsed as required by the Illinois Statute then in force, hence the plaintiff never acquired title. It must be borne in mind that the Common Law or Law Merchant of England (Stat. 3d and 4th, Anne Ch. 9,) *was never in force in Illinois*, but the negotiability of notes, bills of exchange, etc,, is regulated by statute, which required all instruments which name a payee to be endorsed by him in order to pass the title.

> *New Hope Del. Bridge Co.* v. *Perry*, 11 Ill. 467.
>
> Gross Statutes Neg. Insts. Ch. 73, § 4.

These bonds and coupons were made in Illinois with interest payable there, and are therefore governed by this statute.

The charter of the Illinois Grand Trunk Railway appears in 2 Private Laws of Illinois, 1867, p. 596–7–8. It is in terms made a public act and provides:

SEC. 1, p. 596. That —— and their associates, etc., are created a body politic and with power * * to purchase, hold, lease, *sell* and convey estate, real, personal and mixed, so far as may be necessary to carry out the intentions of this act; and also for such purposes may make, execute and deliver bonds, notes, mortgages or other evidences of indebtedness, * and for such purposes may negotiate for and take the same.

SEC. 6, p. 597. The directors * or a majority of them shall constitute a quorum for the transaction of business, and shall elect one of their number to be president of said company. They shall also elect a secretary and treasurer and such officers or agents as they shall deem proper.

SEC. –. For the purpose of facilitating the construction of the railroad * * * * said corporation is empowered to borrow money and pledge its property, both real and personal, and its rights, credits and franchises to secure the payment thereof.

Id. p. 598.

There is no averment in the declaration that the president had authority from the corporation to endorse these bonds and thus put them in circulation. No officer has that exclusive power unless given by the charter. We have seen this power vested in the corporation. Without such authority from the board of directors or corporation his act of endorsement was *ultra vires*—a nullity—and passed no title.

Mitchell v. *Deeds*, 49 Ill. 421, 424.

The president or other officer of a corporation, has no *implied* authority derived from his office to act as agent of the corporation, nor can he in virtue merely of his office, sell its property or bonds.

Pierce on Railroads, p. 34.
Mitchell v. *Deeds*, 49 Ill. 418, 424.

Walworth Co. Bank v. *Farmers' Loan and Trust Co.* 14 Wis. 325, 329.

Titus et al. v. *Cairo & Fulton R. W. Co.*, 37 N. J. (Law) 98.

McCullough v. *Moss*, 5 Denio. 566, 575.

Hoyt v. *Thompson*, 5 N. Y. 320, 333.

Risley v. *Ind. B. & W. R. R.*, 1 Hun. 202, 205.

Marine Bank v. *Clements*, 3 Bosw. 600, 604.

V.

Plaintiff is not a *bona fide* holder. The averment in the declaration on this subject is as follows: "The plaintiff further avers that he became the purchaser and owner of said bonds, and each and every of them with each and every of said coupons attached thereto, to-wit: (naming them) on the 27th day of September A. D. 1871, and before said bonds and coupons became due and payable, for a good and valuable consideration, to-wit: *at the rate of 97 cents on the dollar for all of said bonds and coupons maturing on the 1st day of January, 1872*, and in good faith, without any notice of any defense, etc (Printed Rec. 4, para. 3.)" The declaration avers, therefore, and the demurrer admits that the only consideration paid for the bonds was 97 cents on the dollar for an indefinite amount of other bonds and coupons *maturing January 1st, 1872*. None of the bonds and coupons named and sued on in the declaration matured at the time specified, but all of them matured—the coupons in 1874, '5, '6, '7, '8 and '9, and the bonds in 1881. (Printed Rec. p. 2-3.) So by his own showing (Recr p. 2–3) the plaintiff paid nothing for any or either of the bonds or coupons *in question*, but bought and paid for other bonds.

Again, it is to be observed also, in this connection, that the date of the vote being stated in the bonds, and appearing to be long after the adoption of the constitution, the "innocence" of plaintiff's alleged purchase, and the lack of "notice" of this fatal infirmity, cannot exist. In the language of Chief Justice Waite in *McClure* v. *Oxford Township*, 94 U. S. 432: "To be a *bona fide* holder, one must be himself a *purchaser for value*, without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements."

It will be conceded that municipal corporations like defendant are ordinarily incapable of issuing negotiable promises to pay, and that the *power to issue* such must be conferred by positive law and strictly pursued, or the corporation cannot be held liable thereon.

McClure v. *Oxford*, *supra*.
East Oakland v. *Skinner*, 94 U. S. 258.
Elmwood v. *Marcy*, 92 U. S. 292.
Anthony v. *Jasper County*, 101 U. S. 693.

There can be no *bona fide* holding where the statute did not in law authorize the issuing of the bonds. The objection in such case goes to the want of power. There is an entire want of jurisdiction over the subject.

Cromwell v. *Sac Co.*, 96 U. S. 57.
East Oakland v. *Skinner*, *supra*.
Elmwood v. *Marcy*, *supra*.
Pendleton v. *Amy*, 13 Wall. 304.

It is stated by counsel (brief, p. 15, 16): „In the meantime the road had been constructed and was in operation; depots had been built in a large measure out of monies realized from the sale of these bonds, debts repudiated, etc., *ad nanseam.*" Not one word of this appears anywhere in this record. We are therefore compelled to state in self-defense that no railroad was ever built, or depot constructed, by or for the Illinois Grand Trunk Railway Company, or any successor of it, in accordance with the terms and conditions of this vote of this town, authorizing the bonds to be issued. The bonds were printed in Chicago long prior to their date, procured by fraud to be signed and surreptitiously carried off out of the State and put in circulation. They were never in Walnut township. The Illinois Grand Trunk Railway never existed, except on paper; or performed any known corporate act, except to endorse the bonds by its president.

If plaintiff purchased from the payee, as would appear from the declaration, he must have known these facts, and this would account for the peculiar purchase or trade set forth in the declaration, by which he claims to have acquired title to these bonds and coupons, by buying and paying for certain others at 97 cents on the dollar.

Stress is also laid upon the fact that the auditor registered these bonds in April, 1871. This was a mere ministerical act, whereby the owners put themselves in position to be paid interest by the State Treasurer, pursuant to a law of 1869. It appears one or two years' interest was thus collected on the bonds at Springfield before the Supreme Court declared the law unconstitutional.

The town may be concluded and held liable upon bonds where its officers recite therein sufficient to estop the town and such bonds have, in due course of business, reached innocent holders, as held in *Walnut* v. *Wade*, 103 U. S.

The case here, however, is widely different, as the bonds show on their face that they are *malum prohibtum*. Nor can there be any innocent purchaser of such bonds.

Ignorantia leges neminem excusat.

The declaration containing no cause of action, the demurrer was properly sustained, and the judgment of the Circuit Court must be affirmed.

Respectfully submitted,

ALLAN C. STORY,

For Defendant in Error.

W. C. Goudy